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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 717

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, *Petitioners*

v.

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL., *Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL.

OPINIONS BELOW

The opinion of the court of appeals (R. 342a-73a) is reported at 400 F.2d 1002. The Commission's memorandum opinions and orders adopting and revising the challenged regulations (R. 209a-63a) are reported at 32 Fed. Reg. 10303, 32 Fed. Reg. 11531 and 33 Fed. Reg. 5362.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1968 (R. 374a). The petition for a writ of certiorari was filed on November 7, 1968 and granted on January 13, 1969. The jurisdiction of this Court is based upon 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant sections of the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*, are set forth in Appendix A, pp. 1a-5a, below.

The regulations under review are set forth in Appendix B, pp. 6a-7a, below.

QUESTIONS PRESENTED

1. Whether FCC regulations restricting the freedom of a radio or television station to broadcast discussion of public issues by requiring the station to give notice and furnish free time for reply to any election editorial or any personal criticism of a public figure abridge the freedom of speech and press guaranteed by the First Amendment.

2. Whether the challenged regulations are authorized by the Communications Act.

3. Whether the challenged regulations are invalid because not supported by an adequate FCC investigation and specific findings upon the necessity of the restrictions in order to make available to the public a wide diversity of opinion.

STATEMENT

This case arises upon petitions to review the so-called "personal attack" and "political editorial" regulations issued by the Federal Communications Commission on July 5, 1967, and later amended to permit limited exceptions.

The "personal attack" regulation (Appendix B, p. 6a, below) provides, in essence, that any radio or television station which broadcasts a discussion of a public issue that includes criticism of the "honesty, character, integrity or like personal qualities of an identified person or group" shall (1) notify the person or group, (2) furnish a tape or transcript, and (3) offer time to reply over the station's facilities at the station's expense. The duty is imposed without regard to the truth of the statement, or to whether the station or its employees authorized the criticism or could have prevented it. Examples of political broadcasts used by the Commission to illustrate the scope of the rule appear at R. II Supp. Exh. 75-81.

The "political editorial" regulation (Appendix B, p. 7a, below) provides that, if a radio or television station broadcasts an editorial supporting a candidate for elective office, then the station shall offer opposing candidates (or their chosen spokesmen, if the station prefers) free time for reply. If the editorial simply opposes one of a number of candidates, he must be given free time for reply.

The regulations are enforceable by both civil and criminal sanctions, including cease and desist orders, monetary forfeitures, fines and loss of the license to broadcast. 47 U.S.C. §§ 307(d), 312(a) and (b), 502, 503(b) (Appendix A, pp. 2a, 4a). Their formal issuance was the last relevant step in a gradual process of administrative intrusion into an area which Congress declined to enter. Consequently, we describe the regulatory background before turning to the present record.

A. Regulatory Background

Effective federal regulation of broadcasting began with the Radio Act of 1927, 44 Stat. 1162. In the deliberations leading to its enactment the Senate struck out of a committee bill language providing that, if a licensee should permit a station to be used "for the discussion of any question affecting the public, he shall make no discrimination as to the use of such broadcasting station . . . ."

67 Cong. Rec. 12503 (1926). In 1933 Congress passed but the President vetoed a bill which would have guaranteed "equal opportunities" to the opposing view whenever a broadcasting station was used "in the presentation of views on a public question to be voted upon at any election, or by a government agency." See H. Rep. No. 2106, 72d Cong., 2d Sess. 6 (1933). The same provision was included in the Senate version of the Communications Act of 1934 (S. Rep. No. 781, 73d Cong., 2d Sess. 8 (1934)), but the House rejected the requirement and it was omitted from the enactment. Thus, the only statutory requirement of any right to reply is limited to candidates for public office. Communications Act of 1934, Section 315, 48 Stat. 1088, as amended, 47 U.S.C. § 315 (Appendix A, p. 3a, below).

The Radio Commission appears to have had no general policy of scrutinizing programs for "fairness" although it did speak of the need for competition of opposing views in licensing proceedings involving rival applications or interfering signals where one applicant wished to promote a single selfish interest or point of view. The Radio Commission refused an application to displace a general service station on a preferred frequency where the rival applicant was operating primarily in the interest of a religious denomination.[1] Similarly, the Federal Communications Commission observed in *Young People's Ass'n for the Propagation of the Gospel*, 6 F.C.C. 178, 181 (1938)—

> Where the facilities of a station are devoted primarily to one purpose and the station serves as a mouthpiece for a definite group or organization it cannot be said to be serving the general public. * * * The Commission has accordingly considered that the interests of the listening public are paramount to the interests of the individual applicant in determining whether public interest would best be served by granting an application.

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[1] Great Lakes Broadcasting Co., 3 F.R.C. Ann. Rep. 32 (1929), *modified on other grounds*, 37 F. 2d 993 (D.C. Cir. 1930), *certiorari dismissed*, 281 U.S. 706, involving three applications to use the same frequency.

But this case also involved interference, and the policy went no further than to deny a license to an applicant whose intention was to use the facilities as a mouthpiece for propagandizing a particular point of view.[2]

The next phase was extraordinarily restrictive. In *Mayflower Broadcasting Co.*, 8 F.C.C. 333 (1941), the Commission barred licensees from broadcasting editorials upon public issues. While renewing Mayflower's license

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[2] *E.g.*, Trinity Methodist Church, South v. Federal Radio Commission, 62 F. 2d 850 (D.C. Cir. 1932), *certiorari denied*, 288 U.S. 599 (1933); KFKB Broadcasting Ass'n v. Federal Radio Commission, 47 F. 2d 670 (D.C. Cir. 1931); Chicago Federation of Labor v. Federal Radio Commission, 3 F.R.C. Ann. Rep. 36, *aff'd*, 41 F. 2d 422 (D.C. Cir. 1930).

Two of the other four cases cited by the Government (Br. 13) also involved a choice between rival applications: WBNX Broadcasting Co., 12 F.C.C. 805 (1948); *Laurence W. Harry*, 13 F.C.C. 23 (1948). Robert Harold Scott, 3 P & F Radio Reg. 259 (1946), dismissed a petition seeking to have a broadcaster's license revoked for refusal to sell time for atheistic programs. United Broadcasting Co., 10 F.C.C. 515 (1945), expressed disapproval of a hard and fast rule against selling any time for discussion of controversial public issues; the opinion merely approved a stipulation of all parties to the effect that the licensee would abandon that practice.

The Sixth Annual Report of the Federal Communications Commission, as quoted by the Government (Petitioners' Br. 13), states:

> In carrying out the obligation to render a public service, stations are required to furnish well-rounded rather than one-sided discussion of public questions.

The next sentence, not quoted by the Government, reads, 6 F.C.C. Ann. Rep. 55 (1940):

> The duty of serving the public interest does not, however, imply any requirement that the use of broadcast facilities shall be afforded to the particular individual or group, in view of the principles enumerated above [*i.e.* the prohibition upon censorship and the declaration that broadcasters shall not be common carriers].

because Mayflower promised to cease editorializing, the Commission announced (*id.* at 340)—

> A truly free radio cannot be used to advocate the causes of the licensee. It cannot be used to support the candidacies of his friends. It cannot be devoted to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be an advocate.

The ban lasted eight years.

In 1949, in a *Report on Editorializing by Broadcast Licensees,* 13 F.C.C. 1246 (1949), the Commission decided to permit the broadcast of editorials on controversial questions, but it also undertook to impose upon licensees a duty to afford "a reasonable opportunity for the presentation of all responsible positions" and to play a "conscious and positive role in bringing about balanced presentation of the opposing viewpoints." *Id.* at 1250-51. On occasions, the Commission said, the obligation might require a reasonable effort to secure a responsible expression of the opposing views, but otherwise it would be enough to make the facilities of the station available to the groups wishing to state views in opposition to the original expression. *Ibid.*[3]

The *Report on Editorializing* contained a bare hint of a "personal attack" rule. After observing that the fairness

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[3] Under present Commission policy, once a station has broadcast a program during which a controversial viewpoint is expressed, the fairness doctrine places an affirmative obligation upon the broadcaster to present divergent viewpoints, rather than merely requiring him to accede to requests for reply time. *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance* (hereinafter "Fairness Primer"), 29 Fed. Reg. 10415, 10418 (1964). An account of the history of the fairness doctrine is contained in Sullivan, *Editorials and Controversy: The Broadcaster's Dilemma,* 32 Geo. Wash. L. Rev. 719, 727-47 (1964).

doctrine left the licensee wide judgment in determining "such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there might not be other . . . more appropriate spokesmen," the Commission suggested that the personal involvement of the person making the request should be considered (*id.* at 1251-52)—

> for elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist.

Three points concerning the original fairness doctrine should be noted:

First, the doctrine, as announced, applied only in licensing proceedings, in review of the licensee's general conduct of his license. Later, when the Commission began to make specific rulings, they carried no sanctions and were believed not to be subject to judicial review except in connection with a denial of license renewal—a belief which continued until the *en banc* ruling of the Court of Appeals for the District of Columbia Circuit in *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* now pending in this Court on the merits as No. 2, this Term.[4]

Second, the Commission was most explicit in stating that it was not attempting either to regulate the content of any particular broadcast or to attach specific liabilities to any particular expression (13 F.C.C. at 1255):

> The action of the station in carrying or refusing to carry any particular program is of relevance only as the station's actions with respect to such programs

[4] Red Lion Broadcasting Co. v. Federal Communications Commission, 381 F. 2d 908 (D.C. Cir. 1967), *certiorari granted,* 389 U.S. 968.

fits into its overall pattern of broadcast service, and must be considered in the light of its other program activities.

Third, the Commission left scope for the licensee to exercise a wide discretion. Under the fairness doctrine the inquiry was limited to whether the licensee was "aware of his listening public and is willing and able to make an honest and reasonable effort to live up to his obligation" (*ibid*).

This was the situation in 1959, when Congress amended the Communications Act by exempting news programs from the operation of Section 315(a), which requires a licensee to give all rival candidates for public office equal opportunities for use of its broadcasting facilities (Appendix A, p. 3a, below). The amendment contained a proviso reciting that nothing in the new exemption for news programs should relieve broadcasters "from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." 73 Stat. 557, 47 U.S.C. § 315(a).

In 1962 the Commission broke sharply away from the settled policy of allowing licensees discretion and judging only the bona fides of their efforts to broadcast a balanced range of opinion upon controversial issues. Three cases decided that year held that the Commission would thenceforth require a licensee to make its broadcasting facilities available without charge to any person whose character was criticized in any discussion of a controversial public question, without regard to the overall fairness of the broadcaster's presentations.[5] The duty was stated categorically

[5] Milton Broadcasting Co. (Clayton W. Mapoles), 23 P & F Radio Reg. 586 (1962); Billings Broadcasting Co., 23 P & F Radio Reg. 951 (1962); Times-Mirror Broadcasting Co., 24 P & F Radio Reg. 404 (1962).

in a Public Notice issued July 26, 1963, 25 P & F Radio Reg. 1899.[6]

The background of the restriction upon political editorials is similar. In the July 26, 1963 notice the Commission broke away from the fairness doctrine and announced that when a broadcaster's facilities were used to take a partisan position upon the issues in an election, or to support or oppose a particular candidate, the licensee must notify the candidate concerned and offer his spokesman an opportunity to answer.

The events involved in the *Red Lion* case arose at this stage in the development of the personal attack rule. Red Lion broadcast over its facilities a program in which the Reverend Billy James Hargis, referring to a campaign document by Fred J. Cook entitled *Goldwater—Extremist on the Right,* repeated previously-published reports that Cook was fired from the New York World Telegram after he made a false charge on television against an unnamed official of the New York City government. Treating this as a personal attack the Commission sent letters to Red Lion directing Red Lion to afford Cook free time in which to reply to Hargis over its facilities. The directive con-

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[6] The notice stated:

> (a) When a controversial program involves a personal attack upon an individual or organization, the licensee must transmit the text of the broadcast to the person or group attacked, wherever located, either prior to or at the time of the broadcast, with a specific offer of his station's facilities for an adequate response.
>
> (b) When a licensee permits the use of his facilities by a commentator or any person other than a candidate to take a partisan position on the issues involved in a contest for political office or to attack one candidate or support another by direct or indirect identification, he must immediately send a transcript of the pertinent continuity in each such program to each candidate concerned and offer a comparable opportunity for an appropriate spokesman to answer the broadcast.

tained in those letters is before the Court in the *Red Lion* case. Red Lion was simply directed to offer Cook the free use of its facilities. There was no inquiry into the overall fairness or balance of Red Lion's programs, either generally or with specific reference to the 1964 presidential election.

B. Proceedings Below

On April 6, 1966, the Commission moved to formalize the personal attack and political editorial doctrines and to stiffen enforcement by issuing a notice of proposed rulemaking inviting comments on proposed regulations (R. 3a-9a). Respondents and other interested persons filed comments. A very few organizations supported the proposed regulations. The great majority voiced opposition upon the ground that the personal attack and political editorial rules deterred, rather than encouraged, broadcast discussion of public issues (R. 34a, 36a, 60a, 61a, 63a, 72a, 87a). In particular, some comments asserted that the personal attack and political editorial rules had already inhibited stations from carrying controversial programs, especially live discussions of public issues, and had deterred them from editorializing upon political campaigns (R. 92a-100a, 157a-67a).

On July 5, 1967, the Commission adopted the regulations substantially in the form proposed. Their original text appears at R. 221a-22a.

The Memorandum Opinion and Order adopting the regulations dealt with their effect upon freedom of discussion only to the extent of saying that they were "designed to encourage controversial programming" and would not discourage anyone "except for a licensee who wished to present only one side of such programming" (R. 216a). The Commission made no finding upon whether unregulated discussion of public issues and personalities would provide the public with a full and fair spectrum of opinion upon controversial issues.

On July 27, 1967, Radio Television News Directors Association *et al.* filed in the Court of Appeals for the Seventh Circuit petitions to review and set aside the regulations (R. 264a). Similar petitions (R. 270a and 284a), filed in the Second Circuit by respondents National Broadcasting Company and Columbia Broadcasting System, were transferred to the Seventh Circuit under 28 U.S.C. § 2112.

Thereafter, but within a month of its initial order, the Commission issued the first of two amendments acknowledging that the personal attack regulation, as promulgated, might restrict the presentation of public issues. The amendment exempted "bona fide newscasts or on-the-spot coverage of a bona fide news event." The rationale for the change was explained by the Commission (R. 223a-24a):

> To import the concept of notification within a week period, with a presentation of the person attacked on some later newscast when other news might normally be broadcast, is impractical and might impede the effective execution of the important news functions of licensees or networks.

In other words, the original regulation admittedly interfered with freedom of the press.

The second amendment was adopted on March 27, 1968. By that time this Court had granted certiorari in the *Red Lion* case, 389 U.S. 968, and postponed oral argument until the Seventh Circuit should have decided the present case, 390 U.S. 916. The briefs filed in the Seventh Circuit showed how the personal attack rule would inhibit the presentation of such distinguished public affairs programs as Eric Sevareid's news commentaries, *Face the Nation*, and *Meet the Press*. The illustrations will be found at R. II 1-130. The amendment apparently resulted from a letter written by Assistant Attorney General Turner five days before the Government's brief was due in the court of appeals, suggesting that "the Commission might wish to weigh the

possibility of considering revisions of the rule before proceeding further with the cases now before the Seventh Circuit" (R. 310a-11a). The proposal provoked considerable controversy among the Commissioners, including Commissioner Loevinger's suggestion, denied by his colleagues, that "[f]or the Commission to rewrite its rules now is obviously a cosmetic effort to present a better face in court" (R. 306a).[7]

The new amendment made the personal attack regulation inapplicable—

> (iii) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) shall be applicable to editorials of the licensee).

The exemption is much narrower than it seems, for its scope is carefully tailored to the illustrations used in the Seventh Circuit briefs. Thus, Eric Sevareid's regular broadcasts would be exempt because they are "contained in" the CBS evening news program. Identical commentaries, including Sevareid's special programs, when not bracketed within a newscast, remain subject to the regulation. Similarly, the term "bona fide news interview" covers only programs in a regularly scheduled series. *Face the Nation* and *Meet the Press* are excepted because they are regularly scheduled, but the identical interviews would still subject a broadcaster to the liabilities imposed by the regulation if they were part of a specially scheduled panel discussion, debate, news conference or documentary. In addition, the Commission warned that even the excepted programs remain subject to the "fairness doctrine" (R. 232a-33a).

The last qualification seems to render the new exemptions almost entirely illusory. In paragraph 5 of the supplemen-

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[7] The sundry pleadings in the court of appeals and the opinions in the Commission appear at R. 291a-344a.

tal opinion issuing the amendment (R. 228a-29a), the Commission advised the industry not only that the fairness doctrine would continue to apply but also that, in this instance, the fairness doctrine identifies "a clear and appropriate spokesman to present the other side of the attack issue—the person or group attacked." The net effect seems to be this: Suppose that a personal attack occurred on a regularly scheduled live and unrehearsed news interview program—such as Congressman Powell's describing Congressman Conyers as "a black Judas" (R. II 66). Under the original personal attack regulation every CBS station would have been required to give Congressman Conyers (1) notice, (2) a tape or transcript, and (3) free time for reply. Under the latest amendment, the regulation is inapplicable but licensees must either broadcast the viewpoint of the person attacked or offer him free time for reply under the fairness doctrine as interpreted in paragraph 5.

In issuing the amendment, the Commission sought to steer between acknowledging the reason for the revision and denying the inhibitory effect of the regulation upon discussion of public issues. The opinion (R. 229a, 230a, 233a) explained that in view of the "importance of broadcast journalism in informing the public with respect to political events and public issues" and the absence of past abuse in these expected areas—

> we have decided to strike the balance in favor of exempting these news program categories other than the news documentary. Such action avoids *any* possibility of inhibition in these important areas of broadcast journalism • • •
>
> In sum, since our goal is to encourage robust wide-open debate, we have reexamined the question presented here • • •

But a footnote added (R. 234a n. 5):

> We have found no such effects, and therefore stress that we are not saying or indicating that inhibition of robust, wide-open debate is appropriate or likely in areas other than those exempted here.

The Commission did not explain why it would be an "abuse" for Congressman Powell to call Congressman Conyers a "black Judas" and Congressman Pepper a "number one racist" (R. II 67) in a specially scheduled interview but not on *Face the Nation;* or why the regulation would inhibit commentaries during newscasts but not on other occasions such as a round-up of political reporters.

Commissioner Loevinger dissented upon four specific grounds (R. 240a-41a):

> First, the amendments now adopted, like the preceding rules, have been inadequately considered and are badly drafted. Second, the amendments are unreasonable and unconstitutionally vague. Third, the amendments will impose more regulation and a greater burden on the free expression of ideas and news than the rules without the amendments. Fourth, I have come to doubt the competence of a Government agency such as the Commission to promulgate and administer rules such as these in the area of speech.

Commissioner Bartley also dissented from the adoption of formal regulations.

The court of appeals held the original and amended regulations invalid because they "collide with the free speech and free press guarantees contained in the first amendment" (R. 371a). The court stated (R. 368a-69a):

> In view of the vagueness of the Commission's rules, the burden they impose on licensees, and the possibility they raise of both Commission censorship and licensee self-censorship, we conclude that the personal attack and political editorial rules would contravene the first amendment. Consequently, the rules could be sustained only if the Commission demonstrated a significant public interest in the attainment of fairness in broadcasting to remedy this problem, and that it is unable to attain such fairness by less restrictive and oppressive means. *Keyishian* v. *Board of Regents,* 385 U.S. 589, 602 (1967), and *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960). We do not believe the Commission has made such a demonstration.

SUMMARY OF ARGUMENT

I

The personal attack and political editorial regulations unconstitutionally abridge the freedom of speech and press guaranteed by the First Amendment.

New York Times Co. v. Sullivan, 376 U.S. 254, governs this case. The "personal attacks" of which the Commission seeks to lay hold are the very kind of criticisms the *New York Times* case held constitutionally privileged. Broadcasters are a branch of the press, not mere conduits of others' expressions. Their journalistic functions give the public the same interest in the freedom of broadcasters that it has in the freedom of newspapers. Only two distinctions between this case and *New York Times* are conceivable. Neither is constitutionally relevant.

One conceivable distinction is that where Alabama inhibited personal criticism of public officials by the imposition of an obligation to pay damages, the Commission inhibits debate by imposing a right of reply at the broadcaster's expense. This is a distinction without a difference. "[I]nhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government" (*Lamont* v. *Postmaster General*, 381 U.S. 301, 309 (concurring opinion)). Attaching a right of free reply to any criticism of the personal characteristics of public figures, even when the stated facts are relevant and true, inhibits debate because it makes interference with the broadcaster's journalistic judgment, administrative burdens (including disruption of programming), and loss of revenue, the price of speaking out upon a public issue. The fear of imposing these burdens upon one's own station or every station that carries a network program is bound to generate the same kind of self-censorship that the Court sought to avoid in *New York Times*, not only on the part of reporters, commentators, editors, and producers but also by those who arrange programs and their invited guests.

The second conceivable distinction is that this case involves broadcasting, the "fairness" of which the Government seeks to regulate in the hope of providing the public with access to a "balanced presentation" of views upon controversial issues. But broadcasting is part of the press; it performs the same journalistic and editorial functions as magazines and newspapers and its relative journalistic importance is bound to increase. The basic postulate of the First Amendment is that the public will best be informed upon matters essential to self-government if debate is open and uninhibited, even though it includes ill-timed, biased or unfair individual expressions. Over-all fairness is left to the multiplicity and diversity of voices attendant upon unregulated expression—not to government supervision of the "fairness" of individual publishers. The claim that an exception must be made for the personal attack and political editorial regulations fails for two independently sufficient reasons:

(1) There is not the slightest reason to believe that Government regulation of the "fairness" of each radio and television station is necessary to give the public access to multiplicity and diversity of opinion. We deal here not with unique situations that might be imagined but with a general regulation applicable everywhere, to radio as well as television and to individual stations as well as networks. Under such circumstances one cannot judge access to full and fair debate by supposing that each member of the public sits glued to the programs of a single broadcaster. In nearly every community the number of broadcasting stations whose programs are received is greater than the number of newspapers of general circulation. Radio and television are only two of many forums in which the general public has access to a multiplicity and diversity of unregulated expression. The actual condition of the media, therefore, contradicts the claim that the fairness of each individual broadcaster's programming must be subjected to official scrutiny in order to secure the public interest in exposure to all sides of public questions.

(2) The challenged regulations are more restrictive than necessary to secure "fairness" on the part of individual stations. Unlike the fairness doctrine, instead of viewing the licensee's performance as a whole the regulations fasten upon specific programs, even single phrases in a program. They leave no scope for judgment by the licensee but hold him rigidly to the Commission's *ex post facto* determinations. They apply even though the programming is "fair" and "balanced" under other tests. Each "personal attack" or political editorial entails potentially burdensome obligations. Each violation carries the threat of penal forfeiture, criminal prosecution or license revocation. The regulations are also exceedingly vague. Such terms as "attack," "character," and "like personal qualities" are subject to diverse interpretations and applications, as the Commission itself has acknowledged (R. 215a). Faced with uncertainty and the threat of burdensome obligations if he guesses wrong at the time of the broadcast, the licensee—as the court below recognized—"will become far more hesitant to engage in controversial issue programming or political editorializing. Consequently, he will 'steer far wider of the unlawful zone.' *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958)" (R. 362a). The challenged regulations are therefore unconstitutional even if the less restrictive general fairness doctrine can be sustained.

II

The Communications Act does not authorize the challenged regulations.

The Commission's rule-making authority is to make such regulations "as may be necessary in the execution of its functions" or "to carry out the provisions of this Act." Sections 4(i), 303(r), 47 U.S.C. §§ 154(i), 303(r) (Appendix A, p. 1a, below). Regulating the content of public affairs programs is neither a Commission function nor a purpose of the Act. Section 326 (Appendix A, p. 4a, below) provides that nothing in the Act shall be understood "to give the

Commission the power of censorship over the radio communications or signals transmitted by any radio station." In considering the Radio Act of 1927 and later the Communications Act of 1934 Congress rejected proposals to require a licensee who presented one side of a public issue to give equal opportunity for reply.

The Government's argument that the 1959 amendment to section 315 supports the challenged regulations rests upon a proviso declaring that the exemption of news programs from the equal-time-for-political-candidates rule should not be construed as relieving broadcasters "from the obligation imposed upon them under this Act . . . to afford reasonable opportunity for the discussion of conflicting views on issues of public importance" (Appendix A, p. 3a, below). Even if this reference to the fairness doctrine could be said to constitute backhanded approval, the proviso does not give even oblique support to the challenged regulations. The personal attack and political editorial rules did not exist in 1959. They go beyond any interpretation of the fairness doctrine prior to 1959 both because they impose detailed obligations based upon specific incidents without regard to the licensee's over-all performance and because they leave no room for the honest exercise of discretion. These limitations were emphasized in the Commission's testimony upon the 1959 amendment.

When personal and political liberties are at stake, only "the most explicit authorization" will support agency action in "an area of doubtful constitutionality." The principle is supported both by the propriety of avoiding doubtful constitutional questions and by the wisdom of requiring decisions of great constitutional import to be squarely faced by Congress rather than "relegated by default to administrators who, under our system of government, are not endowed with authority to decide them" (*Greene* v. *McElroy*, 360 U.S. 474, 506-08).

III

The challenged regulations are also void because the Commission itself, like the Congress, has never squarely confronted and made a finding upon the critical question. The only even arguable constitutional justification for regulations inhibiting political editorials and personal criticisms privileged under the doctrine of *New York Times Co.* v. *Sullivan*, 376 U.S. 254, would be a showing that the technology of broadcasting denies the public access to full diversity and multiplicity of opinion unless each individual licensee presents balanced programs. There are strong reasons for concluding that no such condition exists. Whether that be true or not, the Commission's case is defective because it has made no finding upon the question.

This is no mere technical requirement. Liberty of the press should not be left at the mercy of casual assumptions or inattention to the facts. The Court cannot judge whether an impelling legislative purpose justifies the inhibition upon freedom when the facts concerning the need have been neither developed nor evaluated by the bodies with primary responsibility.

ARGUMENT

I

THE PERSONAL ATTACK AND POLITICAL EDITORIAL RULES ABRIDGE THE FREEDOM OF SPEECH AND PRESS GUARANTEED BY THE FIRST AMENDMENT

This case and *Red Lion Broadcasting Co.* v. *Federal Communications Commission* require the Court, for the first time, to examine in depth the application of the First Amendment to the Commission's claim of power to regulate the content of radio and television broadcasts discussing public issues. Prior decisions make it plain, on the one hand, that the guarantees of the First Amendment are generally applicable to broadcast journalism because the "press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell*

v. *City of Griffin*, 303 U.S. 444, 452. See *Burstyn* v. *Wilson*, 343 U.S. 495, 503; *United States* v. *Paramount Pictures*, 334 U.S. 131, 166; *St. Amant* v. *Thompson*, 390 U.S. 727; *Superior Films* v. *Department of Education*, 346 U.S. 587. On the other hand, *National Broadcasting Co.* v. *United States*, 319 U.S. 190, correctly held that, because of the special nature of the medium, the government may not only license broadcasters under rules preventing interference and securing qualified licensees but it may also regulate the economic structure of the industry—the ownership and control of licensees—in ways that promote independence.[8] The Court has never had the occasion, however, to consider regulatory measures dealing directly with the content of broadcasts upon public issues. Rulings by the lower courts prior to the instant case have been confined to occasional opinions of the Court of Appeals for the District of Columbia Circuit.[9]

For a number of years the Federal Communications Commission, as we show in our Statement, has been gradually intruding upon the freedom of the electronic press: first, by prohibiting all broadcast editorials (a prohibition since withdrawn); second, through the fairness doctrine and its latter-day interpretation as applied to "personal attacks"; and, third, through the personal attack and political editorial regulations here under review. There was no real challenge to these Commission policies prior to this litigation, partly because there appeared to be no method of attacking

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[8] See also Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U.S. 266; Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134; Federal Communications Commission v. WOKO, Inc., 329 U.S. 223; Regents of the University v. Georgia, 338 U.S. 586.

[9] Red Lion Broadcasting Co. v. Federal Communications Commission, *supra;* Office of Communication of the United Church of Christ v. Federal Communications Commission, 359 F.2d 994 (D.C. Cir. 1966); and cases cited in note 2, above.

the fairness doctrine without risking loss of a broadcasting license and partly because the fairness doctrine was much less inhibiting than the challenged regulations. As Chief Judge Bazelon recently observed, "it may well be that some venerable FCC policies cannot withstand constitutional scrutiny in the light of contemporary understanding of the First Amendment and the modern proliferation of broadcasting outlets." *Banzhaf* v. *Federal Communications Commission*, D.C. Cir., No. 21,285, decided Nov. 21, 1968, slip. op., pp. 31-32, petition for certiorari pending sub nom., *Tobacco Institute* v. *Federal Communications Commission*, No. 1036, Oct. Term, 1968.

But while the present case requires examination of fundamental questions, the decision can be put upon relatively narrow grounds. The court of appeals, in invalidating the regulations under the First Amendment, confined itself to ruling upon the constitutionality of these regulations upon this record. The opinion does not rule upon the constitutionality of the fairness doctrine to which the Government devotes most of its brief.

Our argument follows the course taken by the court below. The basic proposition is very simple: *New York Times Co.* v. *Sullivan*, 376 U.S. 254, governs this case. The "personal attacks" of which the Commission seeks to lay hold are the same kind of criticism of public figures that *New York Times* held to be constitutionally privileged. The public has the same interest in the journalistic freedom of broadcasters as of newspapers. Both are part of the press. *New York Times* cannot be distinguished upon the ground that where Alabama inhibited personal criticism of public officials by the imposition of an obligation to pay damages, the Commission would inhibit it by attaching a right of reply at the broadcaster's expense. The latter obligation, which the Commission would attach even to true statements, is potentially as burdensome and even more likely to generate self-censorship than fear of a judgment for damages. Nor can *New York Times* be distinguished upon the ground

that this case involves the electronic press, the "fairness" of which Government thinks it must regulate in order to insure that the public has access to a variety of views upon controversial issues. The public generally has access to multiplicity and diversity of opinion through a wide variety of uninhibited voices. Furthermore, the challenged regulations impose burdensome restraints and generate self-censorship wholly unnecessary to secure "fairness" on the part of individual broadcasters.

In developing this thesis, we invoke a number of basic constitutional principles which suggest that, under existing conditions, any Commission regulation of broadcast debate upon public issues violates the freedom of the electronic press. But we need not stand upon so broad an argument. The personal attack and political editorial regulations have additional constitutional weaknesses which would render them invalid even if the constitutionality of the fairness doctrine were upheld. The heart of our case, therefore, is that the concurrence of all the factors renders the challenged regulations invalid regardless of what might be true of different rules or of these rules under different conditions.

A. Broadcast Licensees Exercise Journalistic Functions Which Make Them Part of the Press Whose Freedom Is Secured by the First Amendment.

Ordinary experience demontrates that, although some aspects of radio and television broadcasting fall within the entertainment industry, others are functionally indistinguishable from conventional journalism. Broadcast licensees gather, edit, and present the news. In the case of national news, the network services perform much the same function that the wire services fill for newspaper publishers. Local news is gathered, edited, and presented by the corps of reporters and editors organized by individual broadcasting stations. There is live coverage of portions of major events, along with commentary, as at the 1968 Democratic

and Republican National Conventions. Many radio and television stations carry editorials despite the discouragement of the challenged regulations. Eric Sevareid and Edward P. Morgan broadcast counterparts in the electronic press of the newspaper columns of James Reston and Joseph Kraft. In-depth coverage is provided by documentaries and other special features. In addition, broadcasters serve journalistic functions much like those of the editors of magazines and like journals of opinion; they select guests to appear on their programs to present both information and opinion.

The Government's claim to censorial power ignores these facts. The Solicitor General's words and arguments throughout his brief beg the question by assuming that a broadcast licensee is simply a carrier or vehicle of communication (Petitioners' Br. 41-42, 56-57). Similarly, the amici supporting the Government take as their premise the erroneous assumption that broadcasting is to be likened to a public park as a place for meetings, or to a street as a place for parades.[10] Forty or fifty years ago it was unclear whether radio stations would develop into an active branch of journalism or be simply passive channels of communication selling the use of broadcasting facilities to others. Early discussions of government regulation of broadcast licensees sometimes assumed the latter characterization.[11] In fact, the development has been in the other direction. One cannot, without advancing a misleading anachronism, ignore the fact that radio and television broadcasters engage in activities and serve functions in our society which

[10] Brief for American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae, pp. 7-14. Even if this were so, it would be the Government, not the broadcaster, who would be prohibited from discriminating among applicants on the basis of the views which they did or did not state. See Kalven, *The Concept of a Public Forum*, 1965 Sup. Ct. Rev. 1, 25 (Kurland ed.).

[11] *E.g.*, United Broadcasting Co., 10 F.C.C. 515 (1945).

are indistinguishable from the activities and functions of other journalistic media. In the future, an increasing part of the functions of the press is likely to be performed via electronic media instead of newspapers.[12]

The Government's presupposition is also wrong as a matter of legal theory. While the Radio Act of 1927 was under consideration, the wisdom of treating radio broadcasting as a common carrier was considered and rejected. See. S. Rep. No. 772, 69th Cong., 1st Sess. 4 (1926); 67 Cong. Rec. 12358, 12501-04 (1926); 68 Cong. Rec. 4152 (1927). The present Act expressly enacts that "a person engaged in radio broadcasting shall not be deemed a common carrier." Communications Act of 1934, Section 3, 48 Stat. 1064, 1066, 47 U.S.C. § 153(h) (Appendix A, p. 1a, below).

In *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 474, the Court observed that "the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such."[13]

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[12] Within the next decade, it is likely that individual Americans will be receiving press communications not only by means of off-the-air radio and television broadcasts but also via cable television connected to their homes, direct satellite-to-home transmission, and facsimile newspapers transmitted electronically to their homes. See "A Searching Look at the Hardware That Can Reshape TV Broadcasting," Television Magazine, Sept. 1967, p. 35; Sexton, *Bigness —Bad for Newspapers or Merely Inevitable?*, The Quill magazine, Oct. 1967, p. 22; Hult, "Satellites and Future Communications, Including Broadcast," paper presented before the American Astronautical Society, Dallas, Texas, May 1-3, 1967 (reproduced by the RAND corporation).

[13] Section 315, which requires equal treatment for political candidates, is a limited exception to the general theory of the Communications Act since it requires a broadcaster who chooses to make time available to a political candidate, to "carry" whatever the candidate wishes to say and to extend the same opportunity to all other candidates for the office upon equal terms.

Section 315 raises different constitutional issues than the present case for four reasons:

We recognize the need to face the question whether radio and television are not subject to greater government control over their broadcasts than the print media because of the consequences of the technology. But the examination of that question ought to begin with candid recognition of the fact that the functions performed for society by the radio and television broadcaster in the field of public affairs are the same journalistic functions performed by newspaper publishers. Broadcasting is a branch of the press. Its activities and functions make it—no less than newspapers—"one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free." *Mills* v. *Alabama,* 384 U.S. 214, 219.

First, when a licensee carries a candidate's speech, it exercises virtually none of the news gathering functions or editorial functions licensees exercise in the public affairs broadcasts covered by the challenged regulations. The broadcaster's freedom to present his views without incurring burdensome obligations is in nowise affected.

Second, the area covered by Section 315 is very narrow; it applies only to qualified candidates for public office. This was a deliberate legislative decision. See pp. 3-4, 8, above, and pp. 64-76, below.

Third, the personal attack and political editorial regulations impose financial cost upon the broadcaster's taking an editorial position upon candidates or criticizing the personal characteristics of a public figure because he must carry the reply free. Section 315 requires only equal treatment.

Fourth, the vagueness and ambiguities inherent in the personal attack rule, which induce self-censorship, are not involved in Section 315. See pp. 59-64, below.

There is good reason to believe that even Section 315 deprives the public of much useful political debate.

B. The Challenged Regulations Seek To Govern the Public Discussion of Issues at the Center of the Constitutionally Protected Area of Free Expression.

The challenged regulations not only attempt government supervision of what is said by a branch of the press; they invade the central citadel protected by the First Amendment. The personal attack regulation embodies the proposition that a broadcast licensee may not express any criticism of a public figure reflecting upon his character unless he is given notice of the broadcast, the text of the criticism, and free use of the broadcasting facilities for reply. These demonstrable burdens dampen the vigor and limit the variety of debate (see pp. 29-35, below). Criticism of the conduct of public persons, including criticism which reflects upon their personal character, is uniquely valuable—and uniquely protected—speech, because it is indispensable to informed self-government. Editorials supporting or opposing candidates for office, to which the political editorial regulation attaches a similar, burdensome liability, are also integral parts of the democratic process.

New York Times Co. v. *Sullivan*, 376 U.S. 254, held that a State cannot constitutionally award damages for defamatory statements about the conduct of a public official unless the statements were made with knowledge of their falsity or reckless disregard for truth. The same constitutional privilege extends to statements about persons "involved in issues in which the public has a justifiable and important interest." *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 147-148, 155, 162. "[A] rational distinction cannot be founded on the assumption that criticism of private citizens who seek to lead in the determination of . . . policy will be less important to the public interest than will criticism of government officials." *Id.* at 148-49, *quoting Pauling* v. *Globe Democrat Publishing Co.*, 362 F.2d 188 (8th Cir. 1966). These principles, developed in cases involving newspapers and magazines, are equally applicable to radio and television. *St. Amant* v. *Thompson*, 390 U.S. 727.

Virtually all the broadcasts to which the regulations apply fall in the privileged area. The point is indisputable in the case of election editorials. The acknowledged primary function of the personal attack regulation is to apply an automatic formula to every broadcast discussion of men involved in politics and government. Among the leading decisions which the personal attack rule codifies are cases involving criticism of local officials in Milton, Florida;[14] of the general manager of a local rural electrification cooperative;[15] and of a Governor of California running for re-election.[16] The scope of the current regulation is confined by definition to criticisms voiced "during the presentation of views on a controversial issue of public importance" (Appendix B, p. 6a, below). There could be no plainer acknowledgement of the intent to regulate broadcast criticism of public officials and other public figures.

The personal attack rule is not confined to statements that are made with knowledge of falsity or reckless indifference to truth. Not even truth itself is a defense. Nor is the regulation confined to irrelevant character assassination. It applies both to incidents bearing upon fitness for office and to the actual conduct of public affairs.

The conclusion undisputably emerges that the challenged regulations would regulate the electronic press in broadcasting ideas "at the very center of the constitutionally protected area of free expression." *New York Times Co.* v. *Sullivan*, 376 U.S. at 292.[17]

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[14] Milton Broadcasting Co. (Clayton W. Mapoles), 23 P & F Radio Reg. 586 (1962).

[15] Billings Broadcasting Co., 23 P & F Radio Reg. 951 (1962).

[16] Times-Mirror Broadcasting Co., 24 P & F Radio Reg. 404 (1962).

[17] See Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191 (Kurland ed.).

C. The Liabilities Imposed by the Regulations "Abridge" Freedom of Expression.

The common law of defamation attached liability for compensatory damages to defamatory criticism of public figures. The line of cases beginning with *New York Times Co.* v. *Sullivan*, 376 U.S. 254, held that attaching that condition to political expression violates the First Amendment.[8] The Commission now seeks to attach even to non-defamatory criticism liability to provide a "right of reply" over the licensee's facilities and at its expense. Since the new form of liability is both broader and more onerous, its imposition is equally unconstitutional. The great liberties secured by the First Amendment are protected against other forms of abridgment than criminal and civil liability. *Lamont* v. *Postmaster General*, 381 U.S. 301; *Talley* v. *California*, 362 U.S. 60; *American Communications Ass'n.* v. *Douds*, 339 U.S. 382, 402; *Thomas* v. *Collins*, 323 U.S. 516; *Murdock* v. *Pennsylvania*, 319 U.S. 105; *Grosjean* v. *American Press Co.*, 297 U.S. 233.

In issuing the regulations the Commission argued "that they do not *proscribe* in any way the presentation by a licensee of personal attacks or editorials on political candidates" (R. 212a, emphasis supplied). The Government's brief repeats the argument in various forms (Petitioners' Br. 41, 58). If proscribes means "absolutely prohibit," the assertion may be literally accurate, but it confuses the issue because it misconceives the extent of the constitutional protection. One who is subjected to governmentally imposed burdens if he speaks his mind upon a public issue does not enjoy the freedom of speech guaranteed by the Constitution. "[I]nhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to gov-

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[8] St. Amant v. Thompson, 390 U.S. 727; Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (per curiam); Curtis Publishing Co. v. Butts, 388 U.S. 130; Time, Inc. v. Hill, 385 U.S. 374; Rosenblatt v. Baer. 383 U.S. 75; Henry v. Collins, 380 U.S. 356; Garrison v. Louisiana, 379 U.S. 64.

ernment" (*Lamont* v. *Postmaster General*, 381 U.S. 301, 309 (concurring opinion)). The Court has often struck down laws attaching conditions to the exercise of First Amendment rights. The *Lamont* decision invalidated a statute that conditioned freedom to receive foreign communist propaganda upon the addressee's notifying the Postmaster General of his wish to receive it. A registration requirement imposed upon a labor organizer as a condition of making a speech was held unconstitutional in *Thomas* v. *Collins*, 323 U.S. 516. *Talley* v. *California*, 362 U.S. 60, invalidated an ordinance requiring the sponsor of a pamphlet to identify himself upon it. See also *Speiser* v. *Randall*, 357 U.S. 513; *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 402; *Murdock* v. *Pennsylvania*, 319 U.S. 105.[19]

The personal attack and political editorial regulations impose burdens upon the journalistic judgment of broadcasters which are unconstitutional under the cited cases, first, because the obligations incurred as the price of privileged speech are onerous and, second, because they are bound to generate self-censorship.

1. Under the personal attack rule a broadcaster must scrutinize every public affairs program to see whether it includes anything that might be a "personal attack": panel discussions, news analyses outside the time limits of a newscast, documentaries, commentators (except during newscasts), and paid or unpaid political broadcasts. If a "per-

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[19] Earlier, in Near v. Minnesota, 283 U.S. 697, 720, the Court held that the right of a member of the press to present his views on public issues cannot be made dependent on his publishing some other matter, stating:

> [I]t does not matter that the newspaper or periodical is found to be 'largely' or 'chiefly' devoted to the publication of such derelictions [defamation]. If the publisher has a right, without previous restraint, to publish them his right cannot be deemed to be dependent upon his publishing something else, more or less, with the matter to which objection is made.

sonal attack" is included, the broadcaster must notify every person upon whose "character" reflection has been cast; it must give him an exact tape or transcription of the text of the criticism, identifying the date and program on which the "attack" occurred and it must offer a reasonable opportunity to respond over the licensee's facilities at the licensee's expense.

The obligations resulting from even a short public affairs program could multiply rapidly. A few minutes of commentary by Eric Sevareid at the time of Jack Ruby's death contained remarks that could well have been construed as "personal attacks" upon six or seven public figures (R. II 6-7).[20] An unrehearsed panel discussion of a controversial session of the city council or State legislature might well include unpleasant, biting criticism of half a dozen lobbyists or politicians. Even a program on the modern theatre might well produce adverse personal comments upon authors, producers, actors or critics.

Broadcasters anxious to present a variety of opinion upon a wide range of issues through representative commentators, documentaries, and the personal appearance of diverse public figures, nonetheless shrink from a course of action which may require them later to allocate broadcast time in a way contrary to an honest and reasonable journalistic judgment but required by the mechanical rules of the Commission. See *e.g.* R. 157a-175a.

Imposing an obligation to furnish free use of a station's facilities attaches heavy contingent financial loss to every program dealing with public affairs, unless the program is rigorously censored. The broadcaster's stock in trade is time. The maximum time available is 24 hours a day. The

[20] The Sevareid broadcast would have been subject to the personal attack regulation in its original form but exempt under the March 27, 1968 amendment because it was incorporated into a regularly scheduled news program. The same commentary would be subject to the regulation today if broadcast at any other period.

Commission's rule says, in effect, that if a broadcaster sells or uses an hour for discussion of public questions which includes commentary upon public persons, then the Commission will take from the hours remaining as much additional time as anyone subjected to criticism reflecting on his character may reasonably wish for reply. In its effects upon the broadcaster, therefore, the right-to-reply doctrine operates as a "tax" upon controversial speech, much like the taxes invalidated in *Murdock* v. *Pennsylvania,* 319 U.S. 105 and *Grosjean* v. *American Press Co.,* 297 U.S. 233. The more time the broadcaster allocates to debate involving public figures, the higher the "tax" imposed by the Commission.

The burden is not limited to the direct loss of saleable time. Programs are arranged many weeks in advance. Clearing time for reply entails not only heavy administrative burdens but also loss of good will from both sponsors and audience.

2. The personal attack rule generates self-censorship. In the *New York Times* case the Court observed (376 U.S. at 278):

> Whether or not a newspaper can survive a successsion of such judgments [for damages for libel], the pall of fear and timidity imposed upon those who give voice to public criticism is an atmosphere in which First Amendment freedoms cannot survive.[21]

Similarly, even though a broadcaster might be able to carry the administrative burdens and financial cost of full compliance, the self-censorship generated by the Commission's rule renders it void under the First Amendment. News commentary, analyses of public issues, and documentaries often take time from programs producing greater revenue. If the broadcaster must calculate each hour taken from other programs at 100 percent plus an indefinite contingent allowance for replies by persons subjected to personal criticism, he will be under heavy pressure to escape financial loss and irate sponsors by avoiding discussion of

controversial matters of public importance. Everytime a producer or sponsor is inconvenienced in order to clear time for the reply, the burden of his complaints will be added to the financial pressures.

Similar pressure is bound to be felt at every step of radio's and television's journalistic endeavors. For example, Eric Sevareid, at the time of Henry R. Luce's death, broadcast a short essay upon Luce's contributions to American journalism (R. II 15-16) in the course of which he commented upon the liveliness of *Time* magazine but observed that "*Time* strained in every senfence to avoid dullness, which often meant straining truth." Since the editors of *Time* are an identifiable group and the charge of "straining truth" could be said to reflect upon their integrity, the broadcast might well be held to create liability to offer *Time*'s editors free time for reply. If the Commission's rule were upheld Sevareid and other commentators would repeatedly be put to a choice between deleting comments upon public figures that might be regarded as "personal attacks" and risking remarks making every station carry-

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[21] Amici Curiae Office of Communication of the United Church of Christ, *et al.* have alleged in their brief (p. 37) that there is no basis for the suggestion that the burden of furnishing time to reply under the fairness doctrine is comparable to a threat of a $500,000 libel judgment for a single attack such as was involved in New York Times Co. v Sullivan. This allegation ignores reality. For example, the average cost to a commercial sponsor for 15 minutes of prime program time on one of the four Chicago VHF television stations (WBBM-TV, WGN-TV, WBKB-TV WMAQ-TV) is approximately $2,000. Television Digest, Inc., *Television Factbook* 207-b, 208-b, 210-b, and 213-b (1968-69 ed.). In the case of a network of 100 or more stations, the value of the time would be a multiple of the pertinent time costs of the individual stations involved.

ing a program liable to clear time for reply (unless they confined their comments to newscasts).[22]

Networks and broadcast licensees could hardly escape the pressure in choosing their own producers, commentators, news analysts, and moderators and participants in panel discussions, and even in choosing certain types of entertainment programs lampooning public figures and

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[22] Even if the comments are confined to newscasts, the Commission's special application of the fairness doctrine would require presentation of the public figure's position. See pp. 12-13, above, and n. 24, below. The pressure towards self-censorship is also illustrated by the documentary, "Ku Klux Klan: The Invisible Empire," broadcast September 21, 1965 (R. II Supp. Exh. 1-28). The program contained strong criticism of the Klan, but its officials were also given a full opportunity to speak for themselves. The fairness of the program in this respect seems beyond question. However, the documentary also contained more specific and sometimes quite incidental attacks upon at least three other individuals: Jebrald Walraven who was said to claim membership in the Klan and to have turned money over to Lincoln Rockwell as head of the American Nazi Party; the City Attorney of Bogalusa, Louisiana, charged with the duty to prosecute Klansmen for violence against civil rights workers, who was said himself to be a Klansman; and Sheriff Rainey of Neshoba County, Mississippi, charged with the murder of three civil rights workers, who was described as "[o]ne law enforcement official sympathetic to the Klan." Under the personal attack regulation the producer would be forced to choose among (1) omitting specific reference to these telling instances; (2) offering the individuals a place in the documentary at the expense of other material that the producer considered more important; and (3) subjecting every station that might carry the program to possible liability to give notice and a transcript to Walraven, the Bogalusa City Attorney, and Sheriff Rainey, and to offer them free time for reply. The pressure upon the producer to "play it safe" by omitting anything that might be considered a personal attack is all too evident.

Even if the Commission were to say that some of these charges are not "attacks" upon personal character, the producer of "Ku Klux Klan: The Invisible Empire" could not know whether the Commission would make such a ruling, and the uncertainty would be enough to create pressures towards self-censorship.

events.[23] It would be safer, more profitable, and less troublesome to prefer the producer of inoffensive rather than controversial documentaries, to broadcast the bland pundit who dealt in abstractions rather than the biting critic of the shabby and self-seeking; and to select the moderator who steered panel discussions away from, rather than towards, the personal fitness of public officials.

Self-censorship must also operate, under the personal attack rule, to curtail the willingness of licensees to permit the use of their facilities by outspoken public figures. A licensee can take pains to present men with varied interests and points of view; it neither can nor should undertake to censor their presentations. Under the personal attack rule, however, the licensee must either prevent personal criticism or else provide the opportunity for reply regardless of its journalistic judgment and at its own expense as the price of having offered the public a chance to hear the first speaker. For example, Adam Clayton Powell, in a recent one hour program, voiced what would seem to be personal attacks upon his estranged wife, whom he called "a liar," Judge Matthew Levy, who he said had issued "an indecent, obscene, illegal, unilateral order," Congressman Conyers whom he called "a black Judas," and Congressman Pepper whom he described as "one of the number one racists of Manny Celler's committee against me." One of the reporters who was questioning Powell stated that "Rap Brown and Stokely Carmichael had been advocating guerilla-type warfare in the cities," which would seem also to have been a personal attack. (R. II Supp. Exh. 55 *et seq.*) If even three of these people had been given notice as required by the regulation and asserted the right to free time in which to reply on a nation-wide hook-up, the resulting cost and inconvenience would inevitably force the broadcasting system

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[23] Radio and television programming in the "talk," "entertainment" and other arbitrary FCC classifications are deserving of First Amendment protection from the inhibiting rules. "The line between the informing and the entertaining is too elusive . . ." because "[w]hat is one man's amusement, teaches another's doctrine." Winters v. New York, 333 U.S. 507, 510.

to think twice before again inviting such a free-swinging controversial speaker to appear on one of its programs.[24]

In appraising the burdens which the personal attack rule puts upon broadcast discussion of public issues, it is important to remember that it is not confined to defamatory broadcasts. There is no privilege of fair comment upon acknowledged facts. There is no question of recklessness or malice. Not even truth is a defense. The liability runs to groups as well as individuals.[25]

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[24] On other recent programs, William Manchester described Robert Kennedy "as not always scrupulous about the means he employs" (R.II 122); Senator Russell Long described certain employees of Senator Dodd as "treacherous" (R.II 75); and Governor Smylie attacked Robert Welch and John Rousselot of the John Birch Society for "absolute lack of credibility" (R.II 60).

Today, these programs would fall within the exemption for regularly scheduled news interviews (Appendix B., p. 6a, below). The net effect is no different, however, because the exemption would still leave the programs subject to the special version of the fairness doctrine explained in the opinion creating the exemption and that version would require offering the same notice and opportunity for reply, either by the person attacked or someone presenting his point of view. See pp. 12-13, above.

[25] These aspects of the Commission's rule distinguish the "right-of-reply" sometimes proposed as a remedy for defamation. The burden imposed by the Commission's rule is evidenced, however, by the widespread recognition of the harm from applying a right-of-reply-to-defamation doctrine to radio. Professor Zechariah Chafee observed:

> The radio is obviously unsuited to the simple machinery of reply provided by the French and German statutes [obligating the press to print replies to personal attacks]. It might be entirely natural for a commentator to mention two or three prominent persons, e.g., Mr. Ickes, Mr. Pauley, and Mr. Truman, in a single broadcast. If each of those three men should possess the legal right to reply, they would take over practically all the time of this commentator for his next broadcast. The whole character of news comments might easily be changed by such a legal requirement. Consequently, French and German courts have held their statutes inapplicable to the radio. Chafee, *Government and Mass Communications* 187-88 (1947).

Since Professor Chafee wrote, Germany has recognized a limited right of reply in broadcasting. See, generally, Scheer, *Deutches Presserecht* (1966).

Nor is it material that the Commission wished to encourage debate, rather than discourage it. The question is not one of purpose but of consequence. Inhibitions upon speech and press are not saved by a beneficent intention.

There is no greater merit in the Government's argument (Br. 76-78) that the regulations should be sustained until the Commission has time to observe how they operate in practice. The First Amendment does not permit experimentation with inhibitions upon freedom of discussion. No rule is better settled in current constitutional doctrine than that the validity of a restraint upon speech or press will be judged on its face—that is, by its natural and probable tendency—without waiting for specific evidence of suppression. *E.g., Dombrowski* v. *Pfister,* 380 U.S. 479, 486-87; *Aptheker* v. *Secretary of State,* 378 U.S. 500, 516-17; *NAACP* v. *Button,* 371 U.S. 415, 432-33; *Thornhill* v. *Alabama,* 310 U.S. 88. The principle has its greatest value in areas where a statute generates self-censorship, for otherwise all society—not merely those seeking to exercise their rights—would be the loser. *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 66; *Talley* v. *California,* 362 U.S. 60; *Smith* v. *California,* 361 U.S. 147; *Cf. Speiser* v. *Randall,* 357 U.S. 513, 526.

D. The Regulations Are Not Justified by the Commission's Belief That They Will Improve the "Fairness" of Broadcast Discussion.

The justification offered by the Commission in defense of the personal attack and political editorial regulations is that they will produce programs that give the public a better informed view of all sides of controversial public issues.[26] The justification fails, we submit, for two independent reasons:

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[26] Although the Commission's customary argument that licensing and allocation of frequencies require the challenged regulations (R. 366a) has not been advanced by the Solicitor General, the fal-

(1) Government regulation of public affairs broadcasts, in violation of a basic postulate of the First Amendment, is not necessary to give the public access to diversity of opinion upon public issues.

(2) The personal attack and political editorial regulations are more restrictive than necessary to protect any public interest in each licensee's presenting a variety of opinions upon controversial public questions.

1. *Government regulation of public affairs broadcasts, in violation of a basic postulate of the First Amendment, is not necessary to give the public access to diversity of opinion upon public issues.*

We wholeheartedly accept the Government's statement that "the essence of the First Amendment's protection of free speech and a free press is to protect the public generally, and not the parochial interests of the news media" (Br. 53). The question is *not whether* the public interest in access to information and debate shall predominate, *but how* that interest shall be protected.

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lacy may be noted by way of anticipatory replication. The argument breaks down into three propositions:

(a) Since the spectrum is not wide enough to include all demands for its use, the Commission must make broad allocations between broadcasting and other uses such as fire, police, commercial communications, and broadcasting.

(b) A major purpose of allocating a large share of the spectrum to broadcasting is to enable the public to hear vigorous discussion and a wide variety of views upon controversial public issues.

(c) The personal attack and political editorial rules are necessary to "implement" the allocation.

The conclusion (c) does not follow from the premises (a) and (b). Frequencies can be allocated between broadcasting and other uses without regulating the content of broadcasts upon public issues. *A fortiori* allocation does not require a rule that every time any criticism of the personal characteristics of a public figure is broadcast, the licensee must provide free time for reply. All the Commission has to do, in order to make the allocation, is to take the facts as they are—to observe how far the broadcasting industry is, or is not, serving the public interest in the widest possible discus-

The basic postulate of the First Amendment is that the public will be best informed upon matters essential to self-government if debate is wide-open and uninhibited even though it includes biased and partisan expression. The Framers of the Constitution realized that individual members of the press might often be partisan, even scurrilous. Benjamin Franklin, apparently answering charges of unfairness, observed that a newspaper is not a stagecoach with seats for everyone.[27] James Madison noted: "Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press."[28] Robust debate cannot flourish if each publisher

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sion of public affairs—and then allocate to broadcasting in the light of competing demands, whatever share of the spectrum the Commission deems appropriate. Inability to impose the personal attack and political editorial regulations—or even the fairness doctrine—would in nowise impede the Commission's effective performance of the allocation and licensing function. Thus, our contention casts no doubt upon the basic licensing program under the Communications Act. Our argument is only that the Commission may not regulate the very ideas expressed in public affairs broadcasts, either directly by suppression or indirectly by attaching onerous obligations to their expression. This Court recognized the difference in Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470, 475—

> The Commission is given no supervisory control of the programs, of business management or of policy.

[27] Mott, *American Journalism* 55 (3d ed. 1962). Prior to the adoption of the First Amendment, the Framers of the Constitution, including Jefferson, Hamilton, Franklin and Madison, were subjected to scurrilous personal attacks by the press. In this period, which is often referred to as the period of the "party press," most newspapers were either Federalist or Republican and were devotedly one-sided. *Id.* at 71-162. The early history of this "new and rather wild journalism" (*id.* at 143) was by one contemporary's account "abominably gross and defamatory" (*id.* at 146).

[28] 4 *Elliot's Debates on the Federal Constitution* 571 (1876), quoted in New York Times Co. v. Sullivan, 376 U.S. at 271.

must think about being fair to his opponents.[29] Jefferson and Madison would have laughed at the suggestion that the *National Intelligencer* should open its pages to Federalist propaganda while Fenno turned the *Gazette's* Federalist vitriol into a balanced presentation. As the Court eloquently stated in *Cantwell* v. *Connecticut*, 310 U.S. 296, 310:

> To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.[30]

Overall fairness was left by the Framers to be achieved by the multiplicity and diversity of voices attendant upon freedom—not to government supervision of the fairness of individual publishers. The Court summarized the point in *Associated Press* v. *United States*, 326 U.S. 1, 20 ——

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[29] "It is most unlikely that public discussion will have [robust] muscle tone if each publisher must worry about being fair to both sides. * * * Think of a town meeting where the chair would rule that *each* speaker must be fair to both sides!" Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J. Law & Econ. 15, 47 (1967). See Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 Minn. L. Rev. 67, 137-38 (1967).

[30] In the *New York Times* case (376 U.S. at 273 n.13), the Court approved of John Stuart Mill's statement (Mill, *On Liberty* 47 (Blackwell ed. 1947)) that—

> to argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion * * * all this, even to the most aggravated degree, is so continually done in perfect good faith * * * that it is rarely possible, on adequate grounds, conscientiously to stamp the misrepresentation as morally culpable; and still less could law presume to interfere with this kind of controversial misconduct.

> The First Amendment . . . rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . .

In accordance with this view, *Mills* v. *Alabama,* 384 U.S. 214, rejected the attempt of a State government to impose a fairer mode of political discussion than unregulated expression. The statute prohibited the publication, on election day, of newspaper editorials supporting or opposing particular candidates. The State court upheld the law as a reasonable restriction that "protects the public from confusing last-minute charges and countercharges" (*id.* at 219)—much as the Commission seeks to justify its personal attack and political editorial regulations as means of protecting the public interest. If regulating the "fairness" of a debate upon public issues were a proper governmental function, much could be said in support of the State decision. The National Labor Relations Board has put a similar restriction upon speeches 24 hours prior to a representation election. *Peerless Plywood Co.,* 107 N.L.R.B. 427 (1953). This Court nevertheless struck down the statute as an "obvious and flagrant abridgement of the constitutionally guaranteed freedom of the press." 384 U.S. at 219.[31]

The rationale behind this view has been stated in other recent opinions. "Speech concerning public affairs is more than self-expression; it is the essence of self-government."

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[31] It seems most unlikely that the *Mills* decision rests upon the ground emphasized by the Government (Br. 53)—that the Alabama statute did not prevent last minute charges but did prevent effective reply. The opinion itself suggests that this point was irrelevant to the question of constitutionality. Furthermore, wherever the line is drawn and even if no line save the closing of the polls were established, there would be always charges too late for effective answer. Surely the aim of the statute was not to avoid "last minute charges," which is impossible, but to reduce their effect by securing the voters time for calmer reflection. Thus, the point of the decision must have been that the First Amendment leaves no room for government efforts to increase the fairness of political debate by inhibiting freedom of expression.

Garrison v. *Louisiana*, 379 U.S. at 74-75. Accordingly, the people—the ultimate rulers—protected their own ultimate power to govern by withholding from Congress—their legislative agent—all authority to regulate who may speak, or what he may say in the discussion of public affairs. As Madison explained, "[T]he censorial power is in the people over the Government, and not in the Government over the people" (4 Annals of Congress 934 (1794).[32] See Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1 (1965).

The challenged regulations reverse the basic postulate of the First Amendment by imposing an official view of what kind of discussion will be best for the public in the radio and television industry. Radio and television broadcasters are not simply carriers; in dealing with public affairs, they serve the same journalistic functions as newspapers and magazines. It is their expression of their ideas that the regulations inhibit. In place of the interplay between robust and conflicting opinions, the Commission would limit the public to a fare of the bland fairness achieved by official scrutiny and governmental directives enforced by forfeitures, criminal prosecution and loss of license. The vagueness of the regulations, coupled with the burdensome obligations attached to "personal attacks" and political editorials, will force the industry to steer even wider of the dangerous zone and thus deny the "breathing space" required for effective expression. See *New York Times Co.* v. *Sullivan*, 376 U.S. at 271.

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[32] Madison said that the First Amendment "instead of supposing in Congress a power that might be exercised over the press, provided its freedom was not abridged, meant a positive denial to Congress of any power whatever on the subject." 4 *Elliot's Debates on the Federal Constitution* 571 (1836). See *id.* at 572-73, 576; III Farrand, *Records of the Federal Convention of 1787* 256 (1911) (Charles Pinckney).

The undertaking to superintend the fairness of broadcast debate also unavoidably entangles the Commission in many of the evils of censorship. The Government speaks of "fairness" as if the standard were an objective truth, but the subjective nature of the Commission's determinations is demonstrable from the public record.

a. The rules concerning political editorials have undergone repeated change. Prior to 1940, broadcasters were free to editorialize without governmental restriction. From 1940 to 1949, the Commission forbade broadcasters to editorialize. *Mayflower Broadcasting Corp.*, 8 F.C.C. 333 (1941). In 1949, editorializing became permissible, provided the broadcaster used good faith in arranging for opposing views. *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949). In 1963, the Commission forbade editorials endorsing or opposing a political candidate, unless the broadcaster arranged time for the candidate or a spokesman to be designated by him to reply over the broadcaster's facilities at its expense. Public Notice, 25 P&F Radio Reg. 1899 (1963). In 1967, this restriction was embodied in the challenged regulation. Each of these rules involved a censorial decision upon how far and upon what conditions the Government thinks it desirable to allow an electronic journalist to speak his mind upon a political question.

b. The personal attack regulation also entangled the Commission in striking a subjective balance between the public interest (as the censor saw it) in access to fact and opinion, on the one hand, and, on the other hand, in a "balanced" presentation. As detailed in our Statement (p. 11), the modifications made in the personal attack regulation in August 1967 in order to exempt "hard news" reflect a consciousness that the initial effort to achieve "fairness" would deprive the public of prompt access to information. The amendments issued in March 1968 created additional exemptions in order to relieve a danger of inhibiting dis-

cussion which the Commission came to appreciate only after briefs had been filed in the court of appeals illustrating the inhibiting effects of the original regulation. On each occasion, the Commission was unavoidably exercising the censorial power of determining what balance between freedom and constraint upon expression was good for the people.

c. The actual application of the challenged regulations involves the Commission and its staff in detailed scrutiny of the content of programs and in borderline rulings involving subjective judgments upon the worth or desirability of the message.[33] The Commission has ruled that licensees are not required under the fairness doctrine "to make time available to communists or the communist viewpoint."[34] Similarly, atheists have largely been denied protection under the doctrine.[35] Indeed, the Commission's disparate treatment of fairness complaints by atheists and religious believers led Commissioner Loevinger to "suggest that the fairness doctrine applies only when viewpoints acceptable to the Commission are denied the opportunity for presentation."[36] Although such dramatic rulings are infrequent, similar judgments upon whether a reply is worthwhile must inescapably infect staff rulings upon the applicability or inapplicability of such vague terms as "attack," "character," "personal qualities," and "identified . . . group."

In short, the political editorial and personal attack rules violate the basic postulates of the First Amendment both because they entangle the Commission in the role of a cen-

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[33] With regard to Commission "regulation by dossier," see Kalven, *op. cit. supra* note 29, 10 J. Law & Econ. at 21-23.

[34] Fairness Primer, 29 Fed. Reg. at 10418.

[35] Compare Mrs. Madalyn Murray, 5 P & F Radio Reg. 2d 263 (1965), with Brandywine-Main Line Radio, Inc., 4 P & F Radio Reg. 2d 697 (1965); see R. 167a-75a.

[36] Mrs. Madalyn Murray, 5 P & F Radio Reg. 2d at 269 (dissenting opinion).

sor and because they substitute an official view of fairness, applied individually to each licensee, in place of the Amendment's presupposition that "right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection" (L. Hand, J. in *United States* v. *Associated Press*, 52 F. Supp. 362, 372, S.D.N.Y. 1943, *aff'd*, 326 U.S. 1). The revolutionary character of the Government's argument is best appreciated by envisaging an application of the personal attack and political editorial rules to newspapers—a position from which the Solicitor General shrinks in part of his brief (Br. 45) but to which he necessarily returns in asserting that "the interests of the public . . . are not in every case necessarily served by simply relying upon an unregulated 'marketplace of ideas,' because that "marketplace is increasingly one for the affluent and powerful" (Br. 53). If the power to regulate the fairness of the press is claimed on this ground, candor requires acknowledging that it is just as applicable to newspapers as to radio stations. See pp. 45-51 below. The only authority cited by the Government acknowledges both the parallel and the possibility that the thesis requires a constitutional amendment.[37]

We do not suggest that this is necessarily the end of the present case. Circumstances can be imagined in which the media of expression are so few or control is so concentrated as to require a choice between imposing a fairness doctrine and leaving the public with access to only one point of view. Possibly, the basic postulate of the First Amendment would not apply under those conditions. Before any government regulation reversing the basic postulate could be sustained, however, there should be a clear showing of the gravest abuses, endangering paramount interests. *Cf. Thomas* v.

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[37] See Barron, *Access to the Press—A New First Amendment Right*, 80 Harv. L. Rev. 1641, 1666-67 (1967), cited in Petitioners' Br. 56-57.

Collins, 323 U.S. 516; *Sherbert* v. *Verner*, 374 U.S. 398, 406.[38]

No such showing has been made in the present case. No characteristic of the broadcasting industry requires government regulation of public affairs programs in order to provide the public with access to full and fair debate upon controversial issues. A typical broadcasting station is one of many journalistic voices. The public interest in access to a variety of opinions is served by the opportunity to listen to many speakers, each guaranteed the freedom to present his views, fairly and objectively, or with vigorous bias and partisanship, in his journalistic discretion.

The fatal fallacy in the Commission's view is that it envisages members of the public as sitting glued to the programs of a single radio or television licensee, with access to conflicting opinions only if the Commission requires that licensee to present them. The image is totally false because (a) it understates the number of frequencies available and ignores other remedies for any concentration of control in the press; (b) it ignores the interplay between different media of expression; and (c) it misjudges the impact of personal attacks and political editorials upon the radio and television audience. Since the Commission's scarcity theory is wrong in fact, its constitutional argument collapses.

a. Whatever the validity of the assumption that a radio audience had few stations among which to choose in 1929,

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[38] The court of appeals apparently thought that the above principle would sustain an FCC ruling requiring broadcast stations to carry anti-cigarette smoking messages. Banzhaf v. Federal Communications Commission, D.C. Cir. No. 21,285, decided Nov. 21, 1968, *petition for certiorari pending sub nom*, Tobacco Institute v. Federal Communications Commission, No. 1036, Oct. Term, 1968. Thus, the holding in that case, whether sound or unsound, is entirely consistent with our position here.

it has been outmoded by radical changes in technology.[39] Today, access to the broadcasting medium is not so limited by its physical characteristics as to bar reliance on the libertarian assumption that "the widest possible dissemination of information from diverse and antagonistic sources," each free to exercise its own editorial judgment, is the best way to inform the public about controversial public issues. *Associated Press* v. *United States*, 326 U.S. 1, 20.

As of February 28, 1969, there were 6,894 commercial broadcasting stations on the air in the United States: 4,245 AM radio stations, 1,971 FM radio stations and 678 television stations. There were also 176 educational television stations and 365 educational FM stations. Public Notice, FCC Mimeo No. 28841, March 11, 1969. The number of commercial broadcasting stations is three times the approximately 1,763 daily newspapers (R. 117a). More than 1,000 UHF and VHF television channels and another 1,000 FM radio frequencies have been allocated to communities but are not being utilized (R. 117a; 47 C.F.R. § 73.202; Weekly AM-FM Addenda to Television Digest, Vol. 7:40, Oct. 2, 1967).

Scarcity is a relative term, with little meaning in the absence of a frame of reference. Using newspapers as his standard of comparison, FCC Commissioner Loevinger recently testified (*Hearings before the House Committee on Interstate and Foreign Commerce* (Agency Hearings)), 90th Cong., 1st Sess. 631 (1967):

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[39] This change in the technological foundation of the Commission's position has not gone unnoticed by the commentators. Thus, in *Note, Regulation of Program Content by the F.C.C.*, 77 Harv. L. Rev. 701 (1964), the authors observed in another context (77 Harv. L. Rev. at 705-06):

> The demand that each station present a balanced selection of programs seems to have been more compelling in the early days of radio and television than in an age when listeners may choose among a large number of AM, FM, VHF and UHF broadcasts.

> As a matter of fact, the diversity available through news reporting and editorializing by means of broadcasting is now in the order of three or four times the diversity available through newspapers. • • • There are something on the order of 4,000-plus different owners of broadcast properties in the country, there are . . . on the order of 12 to 1,400 newspaper owners in the country.

Although the gross number of broadcasting stations does not alone establish the number of voices heard in particular localities,[40] more exact calculations show that Commissioner Loevinger's comparison was conservatively stated. The number of electronic voices greatly exceeds the number of newspapers in nearly all urban, suburban, and rural areas. Furthermore, nearly every area, metropolitan or rural, receives the radio signals of powerful broadcasting stations located in other cities.

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[40] The following table, derived from U. S. Bureau of the Census, *County and City Data Book 1967*, Table 3; *Editor & Publisher International Yearbook, 1966;* Broadcasting Publications Inc., *Broadcasting Yearbook 1966;* Television Digest, Inc., *Television Factbook* (Stations Vol., 1966 ed.), shows the situation then prevailing in the five largest metropolitan areas:

	1960 Population	Daily Newspapers	Broadcasting stations	AM	FM	TV
New York	10,694,632	21	79	35	35	9
Chicago	6,220,913	13	79	32	39	8
Los Angeles-Long Beach	6,038,771	21	76	32	35	9
Philadelphia	4,342,897	17	52	23	22	7
Detroit	3,762,360	5	41	12	23	6

A similar table (note 42, below) for metropolitan areas within the Seventh Circuit indicates that essentially similar conditions prevail in and around all cities.

Figures for rural areas cannot be obtained in the same degree of detail but the Statewide figures for representative predominantly rural States indicate that there can be very few localities in which

Technological advancements are likely still further to increase the supply of channels available for mass communications in the immediate future. The Department of Justice emphasized this point in a brief filed in the *ABC-ITT* merger case. Referring to such developments as coaxial cable, microwave, laser and satellite communications, it stated: [41]

> [T]here are now on the verge of technological feasibility a number of developments which would multiply the channels of access to the public, and thereby lead to more competition and more diversity in broadcasting. * * * These advances would enable broadcasting to develop free of the spectrum limitations on station outlets which are now the source of network scarcity and economic power.

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the number of newspapers of general circulation is even 50 percent of the number of broadcasting stations whose programs are received regularly:

State	Commercial Broadcast Stations on the Air (1-1-67)				Daily & Sunday Newspapers (1-1-68)	
	Total	AM	FM	TV	Daily	Sunday
Alaska	24	15	3	6	6	2
Kansas	89	59	19	11	51	14
Kentucky	145	98	40	7	28	13
Maine	48	33	8	7	9	1
Minnesota	113	81	21	11	29	8
Mississippi	112	87	17	8	19	7
Nevada	31	19	7	5	7	4
South Carolina	130	93	27	10	17	7
South Dakota	39	27	2	10	12	4

(Source: U.S. Bureau of the Census, *Statistical Abstract of the United States 1968* Nos. 739, 747.)

In both cases exact accuracy would require some allowance for common ownership of broadcasting stations, on the one hand, and newspapers, on the other.

[41] Brief for Appellant, United States v. Federal Communications Commission, D.C. Cir. No. 21147, Sept. 1967, at 72.

The Solicitor General's brief is thoroughly unfair to the court below when it asserts (Br. 45) that the Seventh Circuit "made much of figures showing the gross number of radio and television stations in the United States now exceeds the number of general circulation newspapers," and then criticizes the court on the ground that "this raw comparison of numbers ignores the physical limitations on the service area of any particular station." The court of appeals was not so naive. The opinion mentions the gross figures, but its conclusion was based upon such information as a footnoted table (R. 367a) showing the ratio of newspapers to broadcasting stations on the air in representative metropolitan areas—which the Government neglects to mention.[42] There were also before the court a number of tables prepared from standard statistical sources comparing for other metropolitan areas and also State by State the number of newspapers and broadcasting stations.[43] It seems extraordinary that the Government should seek to cloud the simple fact that the number of radio stations that can be heard in almost every locality in the United States is

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[42] The table was as follows (R. 367a):

Standard Metropolitan Statistical Areas	Daily Newspapers	Broadcasting Stations on the Air—AM-FM-TV
Chicago	13	86
Milwaukee	3	32
Indianapolis	9	29
Peoria	2	11
Madison	2	15
Champaign-Urbana	2	12
Green Bay	1	8

(Source: U.S. Bureau of the Census, *County and City Data Book 1967* 636, 637, 672 (Statistical Abstract Supp.); *Editor and Publisher International Year Book, 1967;* Television Digest, Inc., *Television Factbook* (Stations Vol., 1967 ed.); Broadcasting Publications, Inc., *Broadcasting Yearbook 1967.)*

[43] The summary tables appearing at note 40, above, illustrate the data.

greater than the number of newspapers having any significant circulation.

The other arguments addressed to this point are equally unpersuasive. There is no reason to count weekly newspapers, magazines and books as alternative sources of fact and opinion for newspaper readers (Br. 45) and exclude them in arguing that governmental supervision over radio is needed to secure radio listeners access to a variety of opinions. The service area of a particular station cannot fairly be compared with the supposedly limitless number of people with access to a newspaper (Br. 45). The only fair comparison is between the service area of broadcasting stations and the circulation area of the daily press. The theoretical power of a newspaper to add additional pages gives no assurance that it will voluntarily present a greater variety of opinion than a radio or television station whose programs must be broadcast one at a time and are limited to 24 hours a day or less (Br. 46). The fact that there are sometimes more applicants than available frequencies (Br. 47-48) has no tendency to show that the number of stations on the air is not enough to provide diversity of opinion, even without regard to other media.

The Government also argues (Br. 45) that "in the case of most television and much radio broadcasting, the programming received by the public . . . emanates primarily from a handful of network sources." Whatever the networks' situation may be,[43a] however, it is utterly irrelevant in the present case. The Commission made no finding concerning it. We deal here with general rules. The rules apply to individual licensees as well as networks; to radio as well as television; to local programs as well as network coverage; to broadcasters in areas where there are nine television stations and 70 radio stations as well as areas where there is one. The stations which are respondents in the *RTNDA* case are seeking individual freedom to

[43a] NBC deals with the situation of the networks in its separate brief.

editorialize about political candidates. Red Lion is a radio station, and the program of which the Commission complains did not originate with a network. Indeed, the reported decisions involving complaints under the personal attack and political editorial rules predominantly involve local programs dealing with local issues.[44] Since the Commission chose to eschew both selectivity and investigation of the facts,[45] the rules must fall for overbreadth if they are invalid in any application. *United States* v. *Robel,* 389 U.S. 258, 266; *Brown* v. *Louisiana,* 383 U.S. 131, 143, 147-148 (Justice Brennan concurring); *Cox* v. *Louisiana,* 379 U. S. 536; *Thornhill* v. *Alabama,* 310 U.S. 88.

To the extent that there is danger that consolidation of control and economies of scale may lessen diversity of expression, the Commission has other means of promoting diversity than the abrogation of First Amendment rights.[46] The Commission has already adopted regulations limiting the power of networks,[47] and other rules restricting multiple ownership of broadcast stations in order to permit a greater number of independent voices to be heard.[48] Should further

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[44] See examples in Fairness Primer, 29 Fed. Reg. 10415.

[45] See pp. 77-81, below.

[46] No person may hold a direct or indirect financial interest in more than seven AM stations, seven FM stations and seven television stations (no more than five of which may be in the VHF band). In addition, the Commission may determine that there is a "concentration of control" in a licensee even if he owns fewer than the maximum number of stations permitted. The Commission's regulations also prohibit single ownership of stations with "overlapping" signals. 47 C.F.R. §§ 73.35, 73.240, 73.636. It is the policy of the Commission in comparative hearings for broadcast station permits to give a preference to the applicant who does not already own, or who owns fewest, other media of mass communications. Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394-95 (1965).

[47] National Broadcasting Co. v. United States, 319 U.S. 190.

[48] Amendment of Multiple Ownership Rules, 9 P & F Radio Reg. 1563 (1953); see United States v. Storer Broadcasting Co., 351 U.S. 192.

economic measures be needed to deal with a proven danger of concentration, the *NBC* case [49] would probably sustain their constitutionality.

But the existence of power to prevent monopoly in the media of communication does not sustain the power to inhibit the press in expressing views upon public issues by attaching obligations to the expression of some kinds of ideas. The Solicitor General's reliance (Br. 52-55) upon *Associated Press* v. *United States,* 326 U.S. 1, and *National Broadcasting Co.* v. *United States,* 319 U.S. 190, ignores the most elementary distinction in the law of the First Amendment.[50] Those cases deal exclusively with business practices, with economic organization or control.[51] No one denies

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[49] 319 U.S. 190.

[50] See Robinson, *op. cit. supra* note 29, 52 Minn. L. Rev. at 143:

> There is . . . a marked difference between regulation of the economic structure of a communications industry which is designed to protect the basic minimum conditions in which free, diversified speech may develop and regulation which attempts directly to ensure such diversified speech by examining the speech itself to see if it meets the tests of balance, fairness and diversity.

The Court in *Associated Press* specifically noted that neither AP nor its members were being compelled "to permit publication of anything which their 'reason' tells them should not be published." 326 U.S. at 20 n. 18. In the three-judge court, Judge Learned Hand observed that under the antitrust decree the newspaper publisher "remains unfettered in his selection of what to publish." 52 F. Supp. 362, 374 (S.D.N.Y. 1943).

[51] The Commission has frequently cited the *National Broadcasting* case in support of the fairness doctrine and personal attack and political editorial regulations because the opinion observed that the Commission is not merely a traffic officer policing the airwaves to prevent technical interference but has the burden of determining the "composition of that traffic". (319 U.S. at 215-16). But the case involved no issue of program content, nor any restriction of a licensee's freedom of expression. In rejecting the contention that the First Amendment secured the position of the networks in their economic domination of local stations, Mr. Justice Frankfurter observed that, "freedom of utterance is abridged to many who wish

that all branches of the press are constitutionally subject to regulation of their business practices in the same manner as other industries.[52] This case deals with regulation based upon what ideas of public significance the press chooses to express. This Court has never sustained the government in such a claim of censorial power, keyed to speech itself.

b. In deciding whether a scarcity of available broadcasting channels requires abandoning the fundamental postulate of the First Amendment in order to protect the public's right to diversity of opinion, one cannot fairly look at broadcasting in isolation. People also gather information and opinion from newspapers, magazines, books, public

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to use the limited facilities of radio'' and that ''radio inherently is not available to all'' (*id.* at 226). But the focus of this generalization was quickly made clear (*id.* at 226-27):

> The question here is simply whether the Commission, by announcing that it will refuse licenses to persons who engage in specified network practices (a basis for choice which we hold is comprehended within the statutory criterion of ''public interest''), is thereby denying such persons the constitutional right to free speech. * * * Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

Thus, the actual decision parallels Associated Press v. United States, 326 U.S. 1, where the Court sustained the application of the Sherman Act to a news-gathering service. The opinion asserted the basic First Amendment policy that there should be the ''widest possible dissemination of information from diverse and antagonistic sources'' (*id.* at 20). The *NBC* case merely sustained the Commission's power to preserve opportunities for diversity in the broadcasting industry against private concentrations of economic power. See Kalven, *op. cit. supra* note 29, 10 J. Law & Econ. at 41-45.

[52] Lorain Journal v. United States, 342 U.S. 143 (antitrust laws); Associated Press v. Labor Board, 301 U.S. 103 (labor relations); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (wages and hours); see Grosjean v. American Press Co., 297 U.S. 233, 250 (ordinary personal or business taxes).

meetings, and other sources.[53] The several media are not perfect equivalents, but they are, to a very considerable extent, alternative ways of reaching the same general public. Experience shows that political dialog often crosses the boundaries between the media. In the *Red Lion* case, Cook published a book, *Goldwater—Extremist on the Right.* Later radio programs broadcast by Red Lion supported Goldwater. The magazine *The Nation* later published an article by Cook entitled "Radio Right: Hate Clubs of the Air," in which Cook attacked such licensees as Red Lion and the programs arranged by Hargis. The Red Lion audience undoubtedly had access to both the article and the book. The Democratic National Committee sent out reprints of the article. Red Lion, under FCC pressure, gave the Democratic National Committee time to broadcast a taped discussion entitled "Hate Clubs of the Air." Later, Hargis made the radio "attack" upon Cook. Only a rash man could assert whether Cook's view or Hargis' opinion received easier access to the public or wider attention. Yet it seems safe to say that the debate was far more robust than it would have been if the publishers and distributors of the book, the magazine *The Nation,* and the broadcast licensee had each known at the time of publication that it would be required to conform to a standard of fairness imposed by government regulation.

c. The Commission's supposition that the political editorial and personal attack rules result in something like a public debate before the same audience makes unwarranted assumptions concerning the character and interests of radio and television audiences. There is no reason to believe that the same radio or television audience that hears a

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[53] The record (R. 103a) shows also that there were in 1965 or prior thereto 1,763 daily newspapers, approximately 478 weekly periodicals with the total circulation of approximately 105 million, 1,445 monthly periodicals with a total circulation of 185 million, and 666 general monthly and weekly consumer magazines with a total annual circulation of 4,781,310,000.

political editorial or personal criticism of a public figure will also hear a reply broadcast by the same station. The extent to which the two audiences overlap will depend upon unknown variables, such as the day of the week and the hour of each broadcast and the extent to which the program or station commands a constant following. To the extent that the audiences are different, each hears only a one-sided presentation. A careful scholar recently commented—

> In the absence of more precise information than I have, I can only speculate as to its validity. *I question the validity of the notion of the insulated listener both as a fact and as a significant phenomenon.* My questions go, of course, only to degree. Undoubtedly there are insulated listeners but what I question is that the typical listener is thus insulated, that is to say, that he hears and knows only what is broadcast. Furthermore, I would conceive of most listeners—and particularly those whose mental habits incline them exclusively to listening—as casual listeners. The impact of any one communication on a casual listener would not be great. If the communication is a particularly startling one, it may have a greater effect, but by the same token—i.e., its exceptional character—it is unlikely that it will go unchallenged if not on a subsequent broadcast then by means of one or another formal or informal avenue of communication. Furthermore, in these same terms, I think that *the case for the value of the broadcast reply is much weaker than it is assumed to be.* Most attacks as I have said are received casually and without advance preparation by the listener. After he has heard it, will he be conditioned to expect, wait for, be alerted to a reply? How will the mandated reply or defense reach him? Does he know whether or when it will be broadcast? The advance programs do not give notice of specific replies (though it would be possible for the regulation to require such notice). It may seem something of a paradox but I would hazard the hypothesis that a reply in a newspaper, i.e., as a news item, is more likely to reach a listener than the later program. The newspaper both in time and space has greater extension and great permanency. In short, I would conclude that the autonomy of TV and radio have been much overstated.

Jaffe, *The Fairness Doctrine, Equal Time, Reply to Personal Attacks, and the Local Service Obligation; Implications of Technological Change* 2-3 (U.S. Government Printing Office, 1968) (emphasis supplied).

> The present number of broadcast licensees, the opportunities for interplay of debate across the lines between the media, and the dubiety of assumptions concerning the character of the "insulated listener" prevent making a rational constitutional distinction between broadcasting and other media of communication in respect to regulation of the substance of debate upon public issues.

This is enough to invalidate the Commission's effort to legislate "fairness" through generally applicable personal attack and political editorial regulations. If evidence is brought forward of network power or unique situations in which the justification may be stronger, it will then be time enough to consider the constitutionality of a measure narrowly drawn to meet the particular evil.

2. *The regulations are unconstitutional, even if the fairness doctrine is generally valid, because they inhibit broadcast debate more than is necessary to secure from each licensee a fair presentation of public issues.*

The court below did not rule upon the constitutionality of the "fairness doctrine" (R. 365a) because it was satisfied that the vagueness of the challenged regulations, coupled with their pervasive requirements and severe sanctions, rendered them more restrictive than necessary to effectuate any public interest in the balanced presentation of controversial issues. We submit that the court's approach and conclusion are correct as applied to both *Red Lion* and the instant case.[54]

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[54] *Red Lion* involves not the original fairness doctrine but a special personal attack principle announced in 1963.

The personal attack rule is more restrictive than the general fairness policy propounded in 1949 in three respects:

First, the fairness doctrine looked only to the overall character of a licensee's performance. There was to be no effort, as the doctrine was originally propounded, to regulate the content of any particular broadcast or to attach obligations to any particular expression.[55]. The *Report on Editorializing* stated (13 F.C.C. at 1255, emphasis supplied):

> "While this Commission and its predecessor . . . have . . . properly considered that a licensee's *over-all program service* is one of the primary indicia of his ability to serve the public interest, actual consideration of such service has always been limited to a determination as to whether the licensee's programming, taken *as a whole*, demonstrates that the licensee is aware of his listening public and is willing and able to make an honest and reasonable effort to live up to such obligations. *The action of the station in carrying or refusing to carry any particular program is of relevance only as to the station's actions with respect to such programs fits into its overall pattern of broadcast service, and must be considered in the light of its other program activities.*"

The personal attack rule applies an automatic formula to any broadcast that includes criticism of the "honesty, character, integrity or like personal qualities of an identified person or group," even though the so-called "attack" is part of a balanced presentation of a particular subject.

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[55] The censor's temptation to ignore the limitations of the basic principle in cases where he is convinced of the "right" view are illustrated by a recent case in which the Commission disposed of a complaint against a broadcaster by finding that the broadcaster had acted in good faith in determining that it had complied with the fairness doctrine but that the broadcaster had nevertheless erred and should provide time for the expression of an opposing viewpoint. Time-Life Broadcast, Inc., 15 P & F Radio Reg. 2d 737 (1969).

We have already shown how, under the regulations, the CBS documentary describing the Ku Klux Klan would open every licensee in the network to liability to give at least four individuals free time for reply, even though the program fairly presented leaders as well as critics of the Klan (n. 22, above). The Eric Sevareid broadcast upon Henry R. Luce's contributions to American journalism (p. 32, above) was surely a sincere effort to give a balanced appraisal of the influence of Mr. Luce and *Time* magazine, yet such an analysis would probably fall under the personal attack rule. The documentary upon Robert Kennedy appearing at R. II 119-23 was also a fair presentation, yet today due to the rigidity of the challenged regulation, failure to furnish notice, a transcript, and free air time for reply on at least two or three specific points would violate the regulation. See pp. 29-31, above. Such item by item scrutiny, attaching obligations to each offending item regardless of the overall tenor of programming, is a great deal more restrictive than necessary to provide a variety of views upon public issues.[56]

Second, where the fairness doctrine required only an "honest and reasonable effort" to present varying opinion upon controversial issues, the personal attack and political editorial rules leave no room for journalistic judgment upon the part of anyone but the Commission. The *Report on Editorializing* stated (13 F.C.C. at 1255):

> But it is clear that the standard of the public interest is not so rigid that an honest mistake or error in judgment will be or should be condemned where his overall record demonstrates a reasonable effort to provide a

[56] To this extent the real concern of the Commission seems to be to provide the individual with a remedy for possible defamation rather than to secure public access to diverse views upon public issues. See also Petitioners' Br. 50. This private interest is insufficient to justify the inhibition upon expression. New York Times Co. v. Sullivan, 376 U. S. 254; Rosenblatt v. Baer, 383 U. S. 75; Time, Inc. v. Hill, 385 U. S. 374.

> balanced presentation of comment and opinion upon such issues. The question is necessarily one of the reasonableness of the station's actions, not whether any absolute standard of fairness has been achieved.

The personal attack and political editorial regulations do establish a rigid rule. If the FCC staff concludes that a broadcast included a personal attack, the licensee will not be excused from giving free time for reply by the nicety of the question, the uncertain meaning of the regulation, or a sincere and reasonable belief that no attack was involved. The Commission and its staff stand ready at all times to impose the burden of financial loss and program disruption upon the basis of their own *ex post facto* determinations. Nor does the Commission hesitate, under the political editorial regulation, to substitute its own precise instruction for the judgment of the licensee.[57]

Third, the vagueness of the personal attack regulation increases its inhibitory effect. The critical language is the definition of personal attack:

> an attack . . . made upon the honesty, character, integrity or like personal qualities of an identified person or group. . . .

The definition combines multiple uncertainties.

a. The regulation does not define what constitutes the making of an "attack." The term could refer narrowly

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[57] The degree of detailed program supervision likely to be undertaken by the Commission under the challenged regulations is well exemplified by its rejection of a station's decision to divide an agreed-upon total of 120 seconds of editorial endorsement reply time into 6 announcements of 20 seconds each, instead of dividing the same total time into a greater number of announcements of proportionately shorter duration, as requested by the political candidate making the reply. The Commission, which had ordered the station to "negotiate in good faith" with the candidate, said that the station failed to give reasons for its decision. Letter to KING Broadcasting Co., 11 P & F Radio Reg. 2d 628 (1967).

to those instances in which the speaker is expressing his own critical opinion about some personal quality of an individual or group. Alternatively, it could refer more broadly to statements describing without endorsement someone else's opinion on the subject. It could also apply to a question in which one speaker asks another whether he agrees with the derogatory opinion of some third party.

b. The term "character" embraces a multitude of qualities. The definitions in the *Oxford English Dictionary* that fit the context include:

> The sum of the moral and mental qualities which distinguish an individual or a race, viewed as an homogeneous whole; the individuality impressed by nature and habit on man or nation; mental or moral constitution.
>
> Moral qualities strongly developed or strikingly displayed. . . .
>
> The estimate formed of a person's qualities; reputation. . . .

Under the above definitions, any comment reflecting adversely upon any quality or characteristic of an individual or group may be an attack on his or its "character."

c. The term "like personal qualities" gives the entire phrase virtually boundless meaning. It is hard to think of any human quality that is not embraced by these vague and expansive terms. No one could say in advance whether it was an attack upon Robert F. Kennedy's "character or like personal qualities" to describe him as "ruthless," "abrasive," "trying to ride upon the name of President John F. Kennedy," or "not over scrupulous about the means that he employs."[58] Did Eric Hoffer impugn the character and personal qualities of "that misbegotten Cleaver" by also calling him a "sewer rat"?[59] Was it a

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[58] R. II 120, 122.

[59] CBS Television, "The Savage Heart—A Conversation With Eric Hoffer," (CBS News Special, with Eric Sevareid) broadcast on Jan. 28, 1969.

personal attack for Hoffer to label Eugene McCarthy "vain" and "un-American"?[60] Similar uncertainty would arise from the repetition of such phrases as "black Judas,"[61] or "one of the number one racists,"[62] or "Old Yo-Yo—you never know where he stands."[63]

d. Equally perplexing problems arise in determining who is an "identified individual" and what is an "identified group." For example, does a reference by Senator Long to "sensation-seeking columnists" in the Dodd case identify Drew Pearson and Jack Anderson?[64] Does a reference by Stokely Carmichael to the "white racist policeman" who shot a Negro driving his pregnant wife to a Los Angeles Hospital identify the particular policeman involved in the initial incident of the Watts riot?[65] In the same program did Mr. Carmichael's reference to the Polish-American citizens of Cicero, Illinois, as "savages" entitle some group to reply?[66] If so, does the group consist of all Polish-Americans, or all citizens of Cicero, or all Polish-American citizens of Cicero? Whatever the answer, to whom should the notice and invitation to reply be addressed? To whom, if anyone, was a licensee to send notice when Eric Hoffer called "all these young McCarthyites" "the most treacherous people in the world."[67]

The Commission itself virtually acknowledged the vagueness of the personal attack doctrine in promulgating the regulations (R. 215a; emphasis supplied):

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[60] *Ibid.*

[61] R. II Supp. Exh. 66.

[62] R. II Supp. Exh. 67.

[63] R. II 65.

[64] R. II 75.

[65] R. II 107.

[66] R. II 109.

[67] *Op. cit. supra* note 59.

> [W]e recognize that in some circumstances there may be uncertainty or legitimate dispute concerning some aspects of the personal attack principle, such as whether a personal . . . attack has occurred in the context of a discussion of a controversial issue of public importance; or whether the group or person attacked is "identified" sufficiently in the context to come within the rule. *The rules are not designed to answer such questions.*

The difficulties of licensees charged with complying with rules that "are not designed to answer such questions" are not eased by the Commission's invitation to consult its staff for interpretations (R. 215a, n. 6). A licensee carrying an interview of Eric Hoffer by Eric Sevareid cannot suspend the broadcast while he asks counsel to obtain an FCC ruling upon whether Hoffer's describing "some of these new young Negro leaders, like Stokely Carmichael" as "all phonies" asking gifts of "cans of power" is a personal attack.[68] Commentaries, even when not broadcast as part of a newscast, must be freshly prepared against pressing deadlines. Even documentaries are produced under the urgent pressure of events.[69] There is simply no opportunity for advance clarification of the application of the vague terms of the regulation to specific words of particular broadcast discussion of public affairs.

Apparently the Commission contemplates retrospective clarification after the broadcast has occurred, for it says that the one week allowed for giving notice and offering an opportunity to reply "should be sufficient to allow a licensee to confer with his counsel or with the Commission if there is doubt as to its obligation" (R. 217a). *Post hoc* clarification may enable the licensee to avoid legal proceedings and forfeitures by disrupting its programming and surrendering revenue in order to give the person found to

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[68] CBS Television, "Eric Hoffer: The Passionate State of Mind," (CBS News Special, with Eric Sevareid) broadcast on Sept. 19, 1967.

[69] Wood, *Electronic Journalism* 46-49 (1967).

have been attacked free time for reply, but the obligations are fixed by the broadcast. It is at the time of the broadcast that the licensee (actually, the producer, editor, commentator, or guest speaker) needs to know when the regulation applies, in order to avoid the distasteful and onerous obligations. Regulation in the area of speech and press is unconstitutional unless it clearly describes the conduct affected. *Whitehill* v. *Elkins,* 389 U.S. 54; *Keyishian* v. *Board of Regents,* 385 U.S. 589; *Ashton* v. *Kentucky,* 384 U.S. 195, 200; *Smith* v. *California,* 361 U.S. 147, 151.

In the present context the vagueness of the regulations also eliminates the breathing space necessary to broadcasting robust debate upon controversial public issues. The producers, writers, editors, and commentators who serve the electronic press not only must steer clear of actual personal attacks in order to spare licensees the burden of the attendant obligations, but they must avoid anything that the Commission might subsequently bring within the vague confines of the regulation. Under such conditions, there is no room for the incisive and vigorous debate guaranteed by the First Amendment.

The Commission's declared intention not to seek sanctions against all violations (R. 215a-16a) does not relieve the evil. The declaration itself is unclear. Probably, it means only that in doubtful cases there will be no penalty for failing to give notice and offer time for reply pending a Commission ruling. In that event, the latitude is illusory because the bite comes when the Commission requires the offer. If, on the other hand, the declaration means that the Commission will exercise latitude in deciding when to enforce the regulation, then the Commission would, as the court below observed (R. 369a-70a), "impose substantial burdens on all licensees in the expectation of dealing more severely with a minority of licensees, who engage in 'willful or repeated' acts of unfairness." This Court has repeatedly invalidated statutes written to sweep with an all-encompassing net so that local functionaries could pick and

choose whom they wished to prosecute. *E.g., Cox* v. *Louisiana,* 379 U.S. 536, 557-58; *Saia* v. *New York,* 334 U.S. 558, 562; *Cantwell* v. *Connecticut,* 310 U.S. 296. The same rule should apply to the Federal Communications Commission.

The First Amendment condemns any inhibition upon speech which is more restrictive than necessary to secure the allegedly paramount interest. *Aptheker* v. *Secretary of State,* 378 U.S. 500, 508; *NAACP* v. *Alabama,* 377 U.S. 288, 307; *Shelton* v. *Tucker,* 364 U.S. 479, 488. The personal attack and political editorial regulations are more restrictive than the original fairness doctrine. The Commission asserts that the reasons for the more severe restrictions are a need for procedural specificity and additional sanctions (R. 210a, 214a). Neither will support the additional substantive restrictions upon journalistic freedom of expression.

II

THE PERSONAL ATTACK AND POLITICAL EDITORIAL REGULATIONS ARE NOT AUTHORIZED BY THE COMMUNICATIONS ACT

The provisions of the Communications Act, the history of Congressional consideration of public affairs broadcasting, and the principle that administrative power to curtail the liberties of speech and press depends upon the most explicit legislative authorization demonstrate that the challenged regulations are void for want of statutory authorization.

A. The Communications Act, as enacted in 1934, contained three provisions cited by the Government delegating rule-making power to the Commission: Sections 4(i), 303(r) and 315(c).

Section 315(c) (Appendix A, p. 4a, below) can be dismissed at the outset. Subdivisions (a) and (b), as first enacted, imposed upon any broadcaster who permitted a political candidate to use its facilities the duty to make the

same facilities available to his opponents upon equal terms. Subdivision (c) directed the Commission to prescribe "rules and regulations appropriate to carry out the provisions of this section." Since "the provisions of this section" dealt only with the time accorded to political candidates, regulations dealing with any political editorial and any personal attack during any discussion of a public issue obviously go beyond carrying out the provisions of that section.

Section 4(i) and 303(r) (Appendix A, p. 1a, below) are couched in general terms. The former provides that the Commission may make—

> such rules and regulations not inconsistent with this Act as may be necessary in the execution of its functions.

The latter section grants power to issue—

> such rules and regulations . . . not inconsistent with law, as may be necessary to carry out the provisions of this Act.

The Act nowhere suggests that policing the contents of public affairs broadcasts is one of the Commission's functions. No provision of the Act imposes upon a licensee any specific duties in regard to its programs except for according equal time to political candidates. The Commission finds the power in the very general instruction that it is to be guided by the "public interest, convenience, necessity" in acting upon applications for grant and transfer of licenses. Communications Act of 1934 Section 307(a), 309(a), 310(b), 47 U.S.C. §§ 307(a), 309(a), 310(b). It is too long a leap from the prescribed use of this standard in licensing to the conclusion that the Commission may issue any regulation about the substance of programs that it finds will serve the public interest. As the Court observed in *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 475—

> The Commission is given no supervisory control of the programs, of business management or of policy.[70]

See *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F.2d 497, 500-01 (1st Cir. 1950); 1 Socolow, *Law of Radio Broadcasting* §§ 214-19 (1939).

Section 326 makes clear the limitation on the Commission's authority. It explicitly denies "the power of censorship over the radio communications or signals transmitted by any radio station," and declares that—

> no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

The regulations attach onerous conditions to support of a candidate for election or criticism of a public figure. Imposing an onerous condition upon the broadcast of fact or opinion obviously "interferes" with freedom of expression. See pp. 29-35, above.

B. During the debates upon the Radio Act of 1927 and the Communications Act of 1934 Congress repeatedly rejected proposals to subject broadcasters to the kind of obligation imposed by the challenged regulations. In the 1927 House debate, after the view was expressed that the Commission was to have "no power at all" to control the licensee's exercise of free speech, Congressman Blanton asked: "What is the committee going to do as to . . . political attacks over the radio and regulating or controlling political attacks of one party upon another or one individual upon another?" Congressman White replied that the bill

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[70] See McIntire v. Wm. Penn Broadcasting Co., 151 F. 2d 597, 599 (3rd Cir. 1945), *certiorari denied*, 327 U. S. 779:

> It is clear from history and the interpretation of the Federal Communications Act that the choice of programs rests with the broadcasting stations licensed by the FCC.

"does not deal with that specifically" 67 Cong. Rec. 5480 (1926).[71]

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[71] Congressman White had incorporated a provision giving the Commission this power in a previous bill (H. R. 7357, 68th Cong., 1st Sess. (1924)), but he stated that he had deleted this provision from the current bill because so many had expressed the fear that this power to interfere with licensee program selection was "akin to that of censorship." *Hearings on H. R. 5589 Before the House Committee on the Merchant Marine, Radio and Fisheries,* 69th Cong., 1st Sess. 39-40 (1926).

On the floor of the House, Congressman Davis opposed the Radio Bill because, in his opinion, it did not go far enough in limiting broadcasters' editorial discretion. Explaining the common carrier provision, which he proposed, Congressman Davis stated: "I do not think any member of the committee will deny that it is absolutely inevitable that we are going to have to regulate the radio public utilities just as we regulate other public utilities. We are going to have to regulate the rates and the service, and to force them to give equal service and equal treatment to all. As it stands now they are absolutely the arbiters of the air.

"They can permit one candidate to be heard through their broadcasting stations and refuse to grant the same privilege to his opponent. They can permit the proponents of a measure to be heard and can refuse to grant the opposition a hearing. They can charge one man an exorbitant price and permit another man to broadcast free or at a nominal price. There is absolutely no restriction whatever upon the arbitrary methods that can be employed, and witnesses have appeared before our committee and already have given instances of arbitrary and tyrannical action in this respect, although the radio industry is now only in its infancy." 67 Cong. Rec. 5483 (1926).

As an example of industry practice Congressman Davis quoted the testimony of one broadcaster at the hearings to the effect that radio stations edited just like newspapers and felt free to accept or reject any material presented to them as they thought best. 67 Cong. Rec. 5484 (1926). Congressman Davis' proposal was ruled out of order as not germane. 67 Cong. Rec. 5566 (1926).

Congress did adopt a provision authorizing the Radio Commission to revoke a license upon certification by the Interstate Commerce Commission "that a licensee has been guilty of any discrimination either as to charge or as to service." 44 Stat. 1162, 1168. But it was understood that the provision would have no effect unless the

The Senate Committee, concerned about the possibility that some broadcasters would program important questions in a one-sided manner, amended the bill to provide that, whenever a licensee permitted the use of his station by any candidate for public office or broadcast the discussion of any question affecting the public, his station should be deemed a common carrier and compelled to afford time for reply. 67 Cong. Rec. 12503 (1926). On the floor, the Senate rejected the idea of imposing the duty to present both sides of an issue; it substituted an amendment requiring only that equal opportunities be afforded when a political candidate was permitted to use broadcasting facilities. Senator Dill led the opposition to the Committee proposal because he feared that if discretion were taken away from licensees in this area, they "would have to give all their time to that kind of discussion, or no public question could be discussed." 67 Cong. Rec. 12504 (1926). The debate and vote make it plain that the requirement of equal time for actual candidates was the limit of the obligations Congress was willing to impose.

Interstate Commerce Commission first concluded that broadcasters were "common carriers" subject to its jurisdiction. It was also understood that the ICC had never asserted such jurisdiction. See 68 Cong. Rec. 2567 (1927). See also 67 Cong. Rec. 5559 (1926). Congressman Scott, leader of the House conferees, defended the bill against complaints that it did not go far enough to prevent discrimination by broadcasters, saying: "Yes; and you are trespassing very closely on sacred ground when you attempt to control the right of free speech. It has become axiomatic to allow the freedom of the press, and when Congress attempts by indirection to coerce and place a supervision over the right of a man to say from a radio station what he believes to be just and proper, I think Congress is trespassing upon a very sacred principle." 68 Cong. Rec. 2567 (1927). In any event, this provision was deleted without comment when Congress enacted the Communications Act of 1934. See 48 Stat. 1064 (1934). Indeed, in 1934 Congress specifically provided that "a person engaged in radio broadcasting . . . shall not be deemed a common carrier." 48 Stat. 1064, 1066, 47 U. S. C. § 153(h).

In 1933 Congress adopted a bill (H.R. 7716, 72d Cong., 2d Sess. (1933)) which would have amended the equal-time-for-political-candidates requirement by extending it to all presentations "in support of or in opposition to any candidate for public office, or in the presentation of views on a public question to be voted upon at any election, or by a government agency . . . ." The report of the House conferees stated: "This amendment broadens section 18 . . . [It is] designed to insure equality of treatment to candidates for public office, those speaking in support of or in opposition to any candidate for public office, or in the presentation of views on public questions." H.R. Rep. No. 2106, 72d Cong., 2d Sess. 6 (1933). The proposed amendment would have imposed the same duties as the present political editorial regulation. The bill was vetoed by President Hoover.

The view now advanced by the Government was proposed and rejected a third time during the Congressional consideration of the Communications Act of 1934. A pending House bill would have forbidden broadcasters to deny use of their facilities to groups espousing viewpoints with which they disagreed. This provision was rejected, at least in part because Chairman Sykes of the Radio Commission raised the objection that it deprived the broadcasters of editorial discretion. Chairman Sykes was also questioned about the powers of the Commission in a personal attack situation. He took the position that the Commission had no right to prevent the broadcast of personal attacks, but that, if a station broadcast a series of attacks, at license renewal time the Commission could weigh this in the context of the station's overall programming. No suggestion was made that the Commission had power, or should be given power, to compel a broadcaster to afford time for reply. *Hearings on H.R. 7986 Before the House Committee on Merchant Marine, Radio and Fisheries*, 73d Cong., 2d Sess. 188-89 (1934).

In the Senate the language of Section 315 was broadened to make the equal-time-for-political-candidates requirement

applicable "in the presentation of views on a public question to be voted upon at any election, or by a government agency." S. Rep. No. 781, 73d Cong., 2d Sess. 8 (1934). The House rejected the Senate amendment, however, and the equal time provision was limited to broadcasts by political candidates for election. See H.R. Rep. No. 1918, 73d Cong., 2d Sess. 26, 49 (1934).

In sum, the challenged regulations impose precisely the kind of government interference with broadcasters' freedom of expression that the legislative process thrice rejected.[72]

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[72] On numerous occasions, Congress has refused to adopt proposals that would have restricted licensee programming discretion. See H. R. 14467, 70th Cong., 2d Sess. (1928) (common carrier provision); S. 6, 71st Cong., 1st Sess. (1929) (equal opportunities for candidates, their spokesmen and political parties); H. R. 5716, 71st Cong., 2d Sess. (1929) (similar); H. R. 6227, 73d Cong., 2d Sess. (1934) (common carrier provision); H. R. 9121, 73d Cong., 2d Sess. (1934) (25% of broadcast time must be allotted to public service associations); H. R. 9230 and 9231, 74th Cong., 1st Sess. (1935) (required that regular time be set aside for public affairs discussions and that licensees keep records on applications for time, rejections, and the reasons for the rejections); H. R. 3033 and 3039, 75th Cong., 1st Sess. (1937) (similar); S. 2755 and 2756, 75th Cong., 1st Sess. (1937) (similar); S. 635 and 636, 76th Cong., 1st Sess. (1939) (similar); S. 1806, 77th Cong., 1st Sess. (1941) (equal opportunities must be afforded opposing parties when public officials discuss public questions); S. 814, 78th Cong., 1st Sess. (1943) (similar); H. R. 3716, 79th Cong., 1st Sess. (1945) (common carrier provision); H. R. 4314, 79th Cong., 1st Sess. (1945) (Commission to fix percentage of time allocated to public service programs); H. R. 1936, 80th Cong., 1st Sess. (1947) (similar); H. R. 3595, 80th Cong., 1st Sess. (1947) (equal opportunities required for candidates, their spokesmen, political parties, when referendum questions are discussed, and for the discussion of differing viewpoints on public questions); S. 1333, 80th Cong., 1st Sess. (1947) (similar); H. R. 6949, 81st Cong., 2d Sess. (1950) (equal opportunities for candidates, their spokesmen or when referendum questions are discussed); H. R. 3543, 82d Cong., 1st Sess. (1951) (fixed percentage of time must be allocated to public

C. The 1959 amendment to section 315 does not alter the situation. The amendment resulted from a Commission ruling in the *Lar Daly* case,[73] to the effect that a news or news-related broadcast showing a candidate speaking on a public occasion was a "use" of its facilities that required giving equal time to every other candidate for the same office. In order to relieve broadcasters of this straightjacket, Congress made the equal time requirement of section 315 inapplicable to bona fide newscasts, news interviews, news documentaries, and on-the-spot coverage of bona fide news events. At the same time Congress, in order to prevent abuse of the new exemption, added a declaration that—

> "Nothing [in the exception] shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on the issues of public importance.

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service programs); H. R. 5470, 82d Cong., 1st Sess. (1951) (equal opportunities required for candidates or their spokesmen); S. 1379, 82d Cong., 1st Sess. (1951) (similar); H. R. 7062, 82d Cong., 2d Sess. (1952) (similar); S. 2539, 82d Cong., 2d Sess. (1952) (similar); H. R. 11851, 87th Cong., 2d Sess. (1962) (opportunity for response required when an individual is subjected to ridicule by a candidate utilizing time pursuant to Section 315); H. R. 7072, 88th Cong., 1st Sess. (1963) (equal opportunity to be afforded opponent when station editorializes favoring one candidate or opposing his opponent); H. R. 7612, 88th Cong., 1st Sess. (1963) (similar to H. R. 11851, 87th Cong., 2d Sess.); H. R. 10135, 88th Cong., 2d Sess. (1964) (similar to H. R. 7072, 88th Cong., 1st Sess. (1963)); H. R. 5415, 89th Cong., 1st Sess. (1965) (similar to H. R. 11851, 87th Cong., 2d Sess.). See also H. R. 7716, 72d Cong., 1st Sess. (1931) (similar to H. R. 6949, 81st Cong., 2d Sess. (1950)), which passed both houses of Congress but was pocket-vetoed.

[73] Columbia Broadcasting System, Inc., 18 P & F Radio Reg. 238 (1959).

Even if the 1959 amendment to Section 315 gives a backhanded approval to the fairness doctrine,[74] it grants no

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[74] It seems highly unlikely that Congress intended the proviso to provide statutory authority for the entire fairness doctrine. Section 315 deals only with the presentation of political candidates. The proviso, like the exemption, deals only with various forms of news programs. The only reference to the fairness doctrine is the proviso confining the effects of the exemption. A proviso guarding against too expansive construction of a new exemption is a strange place in which to delegate new authority.

Although the excerpts from the debate quoted by the Government (Br. 18-22) support its contention when read in isolation, a staff study for the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce concluded:

> The ensuing discussion on the floor of the House indicates *the great majority of the Members thought of the proposed legislation solely as a measure relating to appearance by political candidates.* The House voted down an amendment which would have expanded section 315(a) by requiring equal opportunities for opposing "representatives of any political or legislative philosophy" as well as for opposing candidates.
>
> But the language of the Conference Report, and the debates which took place in both houses of Congress prior to the conference, do not seem to establish an intention to ratify the Fairness Doctrine in all of its applications. Moreover, the *Lar Daly* decision, which it was the purpose of this legislation to overrule, did not involve the Fairness Doctrine. Even with respect to political matters, the language actually settled upon by the conferees (i.e., the last sentence now appearing in Section 315(a)) may be read as no more than a statement of the sense of Congress. This was more apparent in the original "Proxmire Amendment" than in the final language adopted. Nevertheless, the conferees regarded this final language as no more than a "modification" of the original Proxmire Amendment.

Legislative History of the Fairness Doctrine: A Staff Study for the House Committee on Interstate and Foreign Commerce, 90th Cong., 2d Sess. 25-26 (Subcommittee Print, 1968) (emphasis supplied). See also Robinson, *op. cit. supra,* note 29, 52 Minn. L. Rev. at 134.

authority for the personal attack and political editorial regulations. The decisions establishing personal attack and political editorial rules were not handed down before 1962—three years after the amendment.[75] The regulations were not issued until 1967—eight years after the amendment. Consequently, when it amended Section 315, Congress could not possibly have approved the personal attack and political editorial regulations.

Authority to issue the regulations cannot be extrapolated from any approval of the fairness doctrine because the regulations flatly contradict the very limitations on which the Commission's representatives laid the most stress in describing the fairness doctrine to Congress.

First, FCC Commissioner Ford explained in his testimony on the 1959 amendment that under the fairness doctrine the broadcaster had "full and complete authority" to make any programming determinations he saw fit "subject only to later review of his whole operation." *Hearings on H.R. 5389, H.R. 5675, H.R. 6326, H.R. 7122, H.R. 7180, H.R. 7206, H.R. 7602 and H.R. 7985 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess. 101* (1959). The challenged regulations, on the other hand, impose automatic liability to grant free time for reply to every personal criticism of a public figure and every editorial supporting a political candidate regardless of any other consideration. The obligation arises in every instance without regard to the overall fairness of either the individual program or the broadcaster's "whole operation."

Second, the Commission explained to Congress in 1959 (*Hearings on H.R. 5389 et al., supra,* at 10):

> When it comes to application of the overall fairness standard a licensee can exercise discretion as to which viewpoints are entitled to be expressed and which spokesmen are entitled to be heard, with the exception

[75] Cases cited note 5, above; Public Notice, 25 P & F Radio Reg. 1899 (1963).

of permitting use of a station by legally qualified candidates for public office.[76]

The challenged regulations, on the other hand, leave no such room for the exercise of journalistic discretion.

The overriding importance attached by the Commission to these two limitations, coupled with the other differences between the fairness doctrine and the challenged regulations, is convincing evidence that the present regulations are outside the scope of anything Congress may have impliedly authorized by its reference to the fairness doctrine in the 1959 amendment.

D. Stated with detachment the arguments concerning the implications of the 1959 amendment may result in a standoff. On the one side, there is legislative history showing that some influential Senators were enthusiastic supporters of the fairness doctrine (see Petitioners' Br. 19-22). On the other, there are contrary indications of an intent not to give broader authority to the Commission.[77] With

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[76] See *Hearings on S. 1585, S. 1604, S. 1858, and S. 1929 Before the Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. 71, 80 (1959); *Hearings on H. R. 5389, H. R. 5675, H. R. 6326, H. R. 7122, H. R. 7180, H. R. 7206, H. R. 7602 and H. R. 7985 Before a a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. 96-101 (1959).

[77] The history of the bills discussed above is the best evidence of Congressional intent. Further, in 1963, Representative Oren Harris, Chairman of the House Committee on Interstate and Foreign Commerce and principal House manager of the 1959 amendments to Section 315, criticized the Commission's expansion of the fairness doctrine as "giv[ing] to the public interest standard of the Communications Act an interpretation which is contrary to the basic pattern of the Act." He warned:

> If the Commission in an attempt to achieve fairness seeks to apply its fairness doctrine to the content of individual programs involving the discussion of issues of public importance

respect to the challenged regulations, the Government can fairly say that they are derivatives from the fairness doctrine. On the other hand, the regulations are markedly more inhibitory and override important limitations emphasized by the Commission in explaining the doctrine to the Congress. Stated most favorably to the Government, therefore, the claimed authority to issue the challenged regulations appears only if uncertainties are resolved in favor of the claim, and even then, the authority can be found only by implication.

Under these circumstances the claim of administrative authority must be rejected. The regulations inhibit the liberty of the press. This Court has consistently adhered to the principle that only "the most explicit" authorization will support agency action in an "area of questionable constitutionality." *Greene* v. *McElroy*, 360 U.S. 474, 506-08; *Kent* v. *Dulles*, 357 U.S. 116, 129-30; *Hannegan* v. *Esquire*, 327 U.S. 146, 156; *Ex parte Endo*, 323 U.S. 283, 299-300. Authorization by Congress in such cases "cannot be assumed by acquiescence or non-action." *Greene* v. *McElroy*, 360 U.S. at 507. Where constitutional rights are at stake, courts "will construe narrowly all delegated powers that curtail or dilute them." *Kent* v. *Dulles*, 357 U.S. at 129.

That principle controls the present case. Nothing in the Communications Act can be read as "the most explicit" authorization for regulations inhibiting criticism of public figures and editorial support of or opposition to political candidates by conferring a right of reply. On the contrary, proposals to impose such obligations were thrice rejected.

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then, contrary to the policy of the Act, the Commission inevitably will inject itself into programming on a day-to-day basis.

Mr. Harris also feared that Commission scrutiny of individual programs would "lead to a blue-penciling by broadcasters of all programs containing reference to public issues. . . ." Address by Oren Harris before the Arkansas Broadcasters Ass'n (quoting Harris letter to FCC Chairman E. William Henry), reprinted in 109 Cong. Rec. 16571 (1963).

The argument under Section 315 shows no more than "acquiescence," and not even acquiescence in the power now asserted.

The reason for the rule is also applicable. Before the Court sustains an administrative restriction of personal liberty, especially freedom of expression, it should have assurance that the legislature, as the policy-making branch of government, has faced up to the conflict between freedom and the alleged need for regulation. Otherwise, "decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them." *Greene* v. *McElroy*, 360 U.S. at 507. *Cf. Cantwell* v. *Connecticut*, 310 U.S. 296, 307-08. See also *Watkins* v. *United States*, 354 U.S. 178, 205-06, where the Court emphasized the need for such a legislative determination in the parallel case of inquiry by a subordinate investigating committee.

The personal attack and political editorial regulations evolved solely from gradually increasing administrative intrusion upon journalistic discretion. Congress, when the question was presented in legislative form, refused to impose upon broadcasters obligations essentially similar to those which the Commission has created. Even the alleged approval of the fairness doctrine in 1959 rests wholly upon indirection. To sustain the challenged regulations in the face of Congress' earlier rejection of essentially similar proposals, solely on the basis of broad phrases like "public interest, convenience and necessity," would, we submit, permit an administrative erosion of freedom of the press without any legislative determination of whether the costs of the sacrifice of a traditional freedom are justified by the need for regulation.

III

THE REGULATIONS ARE INVALID FOR LACK OF SPECIFIC FINDINGS UPON WHETHER ACCESS TO FULL AND FAIR DEBATE WOULD BE DENIED THE PUBLIC UNDER A REGIME OF FREE BROADCAST EXPRESSION

The substantial inhibitions which the challenged regulations put upon freedom of broadcast expression can be justified, if at all, only by a convincing showing that regulating the individual "fairness" of the public affairs programs of each licensee is the only practical way of securing public access to a wide variety of information and opinion. See pp. 38-52 above.

Whether enough broadcasting frequencies are available to provide opportunity for full multiplicity and diversity of opinion under a regime of individual freedom of expression is initially a question of fact, dependent partly upon physical laws and partly upon the current state of the technology. The number of broadcasting facilities has greatly increased during the years since early judicial and administrative rulings.[78] Once the facts were established, one would have to appraise the likelihood that the available opportunities were sufficient to produce the broadcast of a wide diversity of opinion even though each broadcaster was accorded freedom to exercise his own journalistic judgment. And, before the regulations imposing a standard of fairness upon each individual licensee could be approved, it would also be necessary to examine whether requiring each particular station to carry a later reply to a controversial program—or to give the subject of criticism time to respond—offers any real likelihood of reaching the same people who heard the original broadcast. Radio listeners seem to come and go, and shift from station to station. They have access to other mass media of communications.

Except for a few loose characterizations quoted from earlier opinions, the Commission has never explicitly addressed itself to these critical issues. It has not examined

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[78] See pp. 45-86.

the supposed scarcity of channels, analyzed the diversity or uniformity of views expressed or discussed the effect of access to other media. Clearly, it has failed to make any finding of such urgent necessity as would justify departure from the basic policies of the First Amendment.

We believe that the challenged regulations are invalid upon any set of facts that can reasonably be supposed to affect broadcasting generally. If the Court is not persuaded of that point, the failure of the Commission to face the critical question of necessity in the only terms that could provide constitutional justification is still enough to invalidate the regulations. For although it is settled that the courts will reach their own decisions as to both the extent of inhibitions upon speech and the alleged justifications, for purposes of determining the validity of a challenged regulation under the First Amendment, in this case the record does not contain even initial agency findings of the character or of the extent of need for regulation. The presumption of constitutionality will not supply the facts necessary to support the restriction of personal and political liberties. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n.4. Nor should the Court be asked to make assumptions or piece out the essential facts said to support a restriction upon freedom of the press where the agency charged with initial investigation has not made exact findings upon the critical issue. *Cf. United States* v. *Florida*, 282 U.S. 194; *Yonkers* v. *United States*, 320 U.S. 685. The cited cases hold that, where federal authority to control traditionally local aspects of transportation depends upon specific circumstances, the existence of those facts should appear affirmatively and not rest upon inference. "The sacrifice of these legitimate local interests may be as readily achieved through the Commission's oversight or neglect . . . as by improper findings" (*id.* at 691). *A fortiori*, where the existence of the extraordinary power to regulate broadcast expression depends upon alleged circumstances requiring departure from the general guaranty of liberty of the

press, the facts supporting the Commission's claim of authority should be affirmatively disclosed upon a record of thorough investigation directed to the relevant questions.

This is no mere technical requirement. The available data indicate that, in the case of broadcasting, there is no necessity to abandon the basic postulate of the First Amendment. Possibly, a careful study would show the necessity. But liberty, even more than local interests, should not be sacrificed by casual assumptions or inattention to the facts. Insistence that the agency explicitly address itself to the precise issue is bottomed upon the same sound policy that precludes prosecution of speech under "a general and indefinite characterization" (*Cantwell* v. *Connecticut*, 310 U.S. 296, 308) and prevents reading a delegation of authority to curtail First Amendment freedoms into legislation which does not grant it specifically (*Kent* v. *Dulles*, 357 U.S. 116, 129-30; *Greene* v. *McElroy*, 360 U.S. 474, 506-08). In each instance, the reason is that, before the judicial branch rules upon the constitutionality of the restriction, the body charged with policy-making should address itself precisely to the critical question. In the final analysis the Court will decide for itself whether an impelling legislative purpose justifies the curtailment of liberty, but the Court should not be asked to rule upon such a question before the facts concerning the need have been developed and weighed, within the proper constitutional framework, by the bodies having initial responsibility. *Cf. Watkins* v. *United States*, 354 U.S. 178, 205-06.[79]

In the instant case, the history of the Commission's pronouncements strongly suggests that it has never con-

[79] In the *Watkins* case the Court said: "Protected freedoms should not be placed in danger in the absence of a clear determination by the House or the Senate that a particular inquiry is justified by a specific legislative need. . . . It is impossible in such a situation to ascertain whether any legislative purpose justifies the disclosures sought. . . . The reason no court can make this critical judgment is that the House of Representatives itself has never made it."

sidered the question whether the current technology of broadcasting makes it impossible for the general public to receive full diversity of opinion through a multiplicity of uninhibited expressions. The *Report on Editorializing* assumes that, since freedom to broadcast may be restricted by the licensing necessary to prevent interference, the Commission may impose whatever inhibitions upon programming it finds to be in the public interest. 13 F.C.C. at 1257. From the sound premise that the public interest requires access to a variety of views upon public issues the Commission leaps to the unsound conclusion that every licensee should present the variety individually instead of exercising the journalistic judgment accorded to other members of the press. 13 F.C.C. at 1248, 1249. Upon the critical question whether the public would not be better informed by the spectrum of debate presented by a number of licensees each free to exercise its own journalistic discretion, the Commission said only that the absence of a duty of fairness "might conceivably result in serious abuse." 13 F.C.C. at 1254. Nothing in either the *Report* or any later opinion indicates that the Commission has ever examined either the facts bearing upon the scarcity argument or the effect upon the radio and television audience of other media of expression. That reliance upon freedom of the press to produce diverse, if one-sided individual expressions "might conceivably result in serious abuse," is not enough to justify disregard of the basic postulate of the First Amendment. The public is best informed by hearing from a variety of robust and uninhibited, even if violently partisan, sources of opinion.[80]

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[80] As a recent commentator stated, "If the right of the public to receive diverse and balanced viewpoints is the decisive desideratum, it is curious, to say the least, that the Commission purposely insists on ignoring the question of whether the public is in fact receiving diverse and balanced presentations from existing communications media as a whole." Robinson, *op. cit. supra*, note 29, 52 Minn. L. Rev. at 143.

The instant case, therefore, affords a dramatic example of gradual bureaucratic encroachment upon an essential liberty without either legislative or administrative confrontation of the critical issues. The language and legislative history of the Radio Act of 1927 and Communications Act of 1934 incontrovertibly demonstrate that Congress did not consciously determine to give the Commission power to require licensees to give a right of reply to political editorials and personal criticism of public figures. The strongest argument the Government can adduce is an inference of legislative approval for the fairness doctrine which it seeks to draw from the 1959 amendment. Section 315(a), as amended, 73 Stat. 557, 47 U.S.C. § 315(a). Thereafter, in 1962 and 1963, the Commission greatly increased the inhibitions in individual decisions and a press release formulating the personal attack and political editorial rules. In 1967 it added further sanctions, because of a desire to clarify procedure and secure stricter enforcement. But, just as there was never a clearcut legislative determination that the public interest required Congress to impose or authorize the imposition of these restrictions, so the Commission never squarely faced the critical questions of necessity in the only terms that would justify the inhibitions.

Now the Court is asked, first, to read the statute to embody an implied legislative decision to delegate to the Commission a power to impose legal obligations because of the ideas expressed in a broadcast upon public issues—a decision Congress never made expressly in either statutory language or debate—and, next, to presume that the Commission made factual determinations upon the critical issues concerning necessity which are neither expressed in findings nor canvassed in the opinions.

This Court's decisions stand squarely opposed to such erosion of liberty of expression. *Greene* v. *McElroy*, 360 U.S. 474, 506-08; *Watkins* v. *United States*, 354 U.S. 178, 205-06; cf. *United States* v. *Florida*, 282 U.S. 194; *Yonkers* v. *United States*, 320 U.S. 685, 691-92.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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